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663307

Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 455

**THE REPUBLIC OF MEXICO AND THE STEAM-
SHIP "BAJA CALIFORNIA" BY THE REPUBLIC
OF MEXICO, AS OWNER, PETITIONERS,**

vs.

R. B. HOFFMAN

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1944.

CERTIORARI GRANTED NOVEMBER 6, 1944.

No. 10475

**United States
Circuit Court of Appeals**

For the Ninth Circuit.

**THE REPUBLIC OF MEXICO and THE
STEAMSHIP BAJA CALIFORNIA by the
Republic of Mexico, as owner,**

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

Apostles on Appeal

**Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Answer to "Suggestion by the Republic of Mexico"	21
Answer	132
Answers to Interrogatories Attached to the Libel	137
Appeal:	
Assignment of Errors on	216
Bond for Costs on	210
Certificate of Clerk to Apostles on	229
Citation on	2
Designation of Portions of Record, Proceedings and Evidence to be Contained in Record on (CCA)	234
Order Allowing	209
Orders Extending Time to File Apostles and Docket	228, 229
Petition for Allowance of	206
Statement of Points on Which Appellant Intends to Rely on (CCA)	232
Stipulation Amending Designation of Parts of Record to be Contained in Record on (CCA)	237
Stipulation re Record on Appeal and Praeceptum for Apostles on (DC)	222

Index	Page
Appeal—(Continued) :	
Stipulation with Respect to Reproduction of Exhibits on (CCA)	236
Undertaking on Cash Deposit in Lieu of Release and Supersedeas Bond on.....	213
Assignment of Errors	216
Bond for Costs on Appeal	210
Certificate of Clerk to Apostles on Appeal....	229
Citation on Appeal	2
Claim signed "M. Gavica", filed Mar. 30, 1942.	142
Claim signed "R. Salazar", filed Mar. 30, 1942	143
Decree and Order of Reference, Interlocutory.	201
Decree, Final	203
Designation of Portions of Record, Proceedings and Evidence to be Contained in Record on Appeal (CCA)	234
Stipulation Amending	237
Exceptions to the Answer	145
Exceptions to the Claim Executed on Behalf of the Republic of Mexico by the Honorable Rodolpho Salazar	144
Final Decree	203
Findings of Fact and Conclusions of Law....	191
Interlocutory Decree and Order of Reference.	201

Index

Page

Interrogatories Propounded by Libelant to Respondents	13
Interrogatories Propounded by the Republic of Mexico to Libelant	139
Libel in Rem and In Personam	4
Memorandum Opinion	185
Minute Order, Jan. 29, 1942—Order that Cause be Submitted for Decision on Brief.....	127
Monition and Citation and Writ of Attachment with Return of Service	16
Names and Addresses of Proctors	1
Opinion, Memorandum	185
Order Allowing Appeal	209
Order and Decree Denying Sovereign Immunity and Release of Attached Mexican Steamship "Baja California" without Prejudice, etc.	129
Order that Cause be Submitted for Decision on Brief	127
Orders Extending Time to File Apostles and Docket Appeal	228, 229
Petition for Allowance of Appeal	206
Reply to the Suggestion by the United States Attorney for the Southern District of California filed on April 8, 1942	165

Index	Page
Statement of Libelant's Position with Respect to the Suggestion by the United States At- torney	39
Memorandum of Points and Authorities..	41
Statement of Points on Which Appellant In- tends to Rely on Appeal (CCA)	232
Stipulation Amending Designation of Parts of Record to be Printed (CCA)	237
Stipulation and Order Extending Time to Claim and Answer:	
Dated March 5, 1942	130
Dated March 16, 1942	131
Stipulation filed Jan. 28, 1942	25
Stipulation for Release of Vessel	211
Stipulation re Record on Appeal and Praecipe for Apostles on Appeal	222
Stipulation with Respect to Reproduction of Exhibits (CCA)	236
Suggestion by the Republic of Mexico	19
Suggestion by the United States Attorney for the Southern District of California, filed April 8, 1942	147

Index	Page
Exhibit A—Communication addressed to the Attorney General of the United States from Secretary of State, Mar. 27, 1942	148
Exhibit B—Letter, Mar. 23, 1942, directed to the Secretary of State by the Mexican Ambassador and Translation	150
Suggestion by the United States Attorney for the Southern District of California, filed Jan. 28, 1942	32
Exhibit A—Copy of Letter to The Honorable Francis Biddle, Attorney General, from Secretary of State, United States	33
Exhibit B—Translation Copy of Letter, Jan. 6, 1942, addressed to His Excellency Cordell Hull, Secretary of State from F. Castillo Najera, Ambassador, Republic of Mexico	36
Telegram dated April 27, 1942 to United States Attorney from Attorney General	174
Telegram dated Feb. 3, 1942 to United States Attorney from Attorney General	126
Telegram dated Jan. 31, 1942 to Attorney General from United States Attorney	125
Transcript of Hearing Exceptions of Libelant, R. B. Hoffman, to Answer, and to Claim Executed on Behalf of the Republic of Mexico by the Hon. Rodolpho Salazar, April 27, 1942 ..	175

Index**Page**

Transcript of Proceedings on January 29, 1942 45

Exhibits for Libelant:

1-A—Inward Foreign Manifest, showing Cargo Destined for Port of Los Angeles	75
1-C—Inward Foreign Manifest, showing Cargo Destined for Port of San Francisco	78
2—Certain Articles of the Law of General Lines of Communication	83

Exhibits for Respondents:

B-1—Libelant's Translation of Contract for the Management and Business Operation of the Steamships "Campeche" and "Baja California"	48
C—Certificate of Secretary of State Cordell Hull of the United States certifying Ambassador Najera	64
D—Authorization of Ambassador Najera of Mexico to Rodolfo Salazar, Consul of Mexico at Los Angeles....	65
G-1—Translation of Exhibit G—Permit of Secretariat of the Navy of Mexico	67
E-2—Translation of Exhibit E-1—Certificate of Undersecretary of Marine of Mexico	69

Index

Page

Exhibits for Respondents—(Continued) :

E-4—Translation of Exhibit 3—Certificate of Director General of National Properties of the Secretariat of Treasury and Public Credit of Mexico	71
--	----

Undertaking on Cash Deposit in Lieu of Release and Supersedeas Bond	213
---	-----

Proceedings in U. S. C. C. A., Ninth Circuit	239
Order of submission	239
Order directing filing of opinions and decree	239
Opinion, Denman, J.	240
Concurring opinion, Mathews, J.	248
Decree	251
Order denying petition for rehearing	252
Order allowing certiorari	252

NAMES AND ADDRESSES OF PROCTORS:

For Appellant:

**BEN VAN TRESS and
JAMES R. JAFFRAY,**

**311 South Spring Street,
Los Angeles, California.**

For Appellee:

**McCUTCHEN, OLNEY, MANNON
& GREENE,
HAROLD A. BLACK,**

**704 Roosevelt Building,
Los Angeles, California. [1*]**

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 1961-BH

REPUBLIC OF MEXICO, and The Steamship
BAJA CALIFORNIA by Republic of Mexico,
as owner

Appellants

vs.

R. B. HOFFMAN

Appellee

CITATION

United States of America—ss.

To R. B. Hoffman

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 20 day of Feby, A.D. 1943, pursuant to an order allowing appeal filed on January 11, 1943 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 1961-BH, Central Division, wherein The Republic of Mexico, and the Steamship Baja California by the Republic of Mexico, as owner are appellants and you are appellee to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and

speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Ben Harrison, United States District Judge for the Southern District of California, this 11th day of January, A.D. 1943, and of the Independence of the United States, the one hundred and sixty sixth.

BEN HARRISON

U. S. District Judge for the
Southern District of Cali-
fornia

Service of a copy of the foregoing Citation is acknowledged this 12th day of January, 1943, together with copy of Petition for allowance of appeal, Order thereon, Assignment of Errors, Bond for Costs on appeal, and undertaking on cash deposit in lieu of release and supersedeas bond.

McCUTCHEN, OLNEY,

MANNON & GREENE

By **HAROLD A. BLACK**

Attorney for Appellee

[Endorsed]: Filed Jan. 12, 1943. [2]

In the United States District Court for the Southern
District of California, Central Division
In Admiralty
No. 1961-BH

R. B. HOFFMAN,

Libelant,

vs.

The Mexican Steamship BAJA CALIFORNIA, her
engines, tackle, apparel and furniture, and CIA
MEXICANA DE NAVIGACION DEL PACI-
FICO, S. A.

Respondents

LIBEL IN REM AND IN PERSONAM

To the Honorable, the Judges of the above entitled
Court:

The libel of R. B. Hoffman, an individual, against
the Mexican steamship Baja California, her engines,
tackle, [3] apparel and furniture, and Cia Mexicana
de Navigacion del Pacifico, S. A., a corporation, as
owner of the American gas screw Lottie Carson and
as owner of certain cargo, provisions, drugs and other
personal property, and as bailee of certain cargo,
scientific equipment, paraphernalia, machinery and
tools in behalf of the owners and subrogees of owners,
where insurance paid, in a cause of collision, civil and
maritime, alleges:

I.

That libelant is an American citizen, residing at
Alhambra, California, and is now and at all times

herein mentioned the owner and master of the American gas screw Lottie Carson, a vessel of 234 tons net. That said Lottie Carson at all times herein mentioned was fitted for fishing for sharks and had gone to Mazatlan, Mexico during October, 1941 for that purpose, and was about to become actively engaged in the business of fishing for sharks.

II.

Upon information and belief that the steamship Baja California was at all of the times herein mentioned and now is a merchant vessel of approximately 579 tons and flies the flag of the Republic of Mexico.

III.

Upon information and belief that Cia Mexicana de Navigacion del Pacifico, S.A. was at all of the times herein mentioned and now is a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico, and at all said times operated, controlled, navigated and possessed said Baja California.

IV.

That during the morning of October 19, 1941, the [4] Mexican steamship Campeche, which had been lying at anchor in the harbor of Mazatlan and farther out and in a southeasterly direction from the Lottie Carson, caught fire. That said fire was first observed at about 11:00 a.m. That thereafter said Campeche was taken from her anchorage and towed by the Baja California farther into the harbor and in the direction of the place where the Lottie Carson lay at

anchor. That on said day and at about the hour of 2:00 P.M. the steamship Baja California, with the Mexican steamship Campeche in tow, attempted to pass on the port side of the Lottie Carson, which was at anchor, as hereinabove alleged, in the harbor of Mazatlan and farther in the harbor than the Campeche. That when the Campeche was approximately abreast of the Lottie Carson and on her port side the Baja California cast the Campeche adrift by letting go the towline, with the result that the stern and rudder of the Campeche was caused to strike the Lottie Carson on her port side, severely damaging the Lottie Carson and, among other things, cutting a hole in the planking of the Lottie Carson below the water line. That as a result of said collision and damage the Lottie Carson was caused to sink and become waterlogged and although libelant was able to beach the Lottie Carson she nevertheless became a wreck and libelant was obliged to sell her as such.

V.

That the said Lottie Carson had been anchored, and was at anchor, at a place designated by the Port Captain of the Port of Mazatlan. That when those in charge of the Lottie Carson saw that the Campeche was being towed dangerously close to where the Lottie Carson was anchored an attempt was made to have the Lottie Carson towed out of danger by the Mexican tug [5] Tepic, which was the only vessel immediately available for the purpose. But the time was so short and the Tepic of such low power that the Lottie Carson could not be towed out of danger, although every effort was made to do so.

VI.

That at all of the times herein mentioned the Lottie Carson was properly at anchor where she was and was properly handled, and observed all the rules and regulations applicable to a vessel in her situation. That neither the said Lottie Carson nor those in charge of her committed any fault or neglect causing or contributing to said collision, and on information and belief that said collision was due to the carelessness, negligence and fault of respondent Cia Mexicana de Navigacion del Pacifico, S.A. and the Mexican steamship Baja California.

VII.

Upon information and belief that said respondent Cia Mexicana de Navigacion del Pacifico, S.A. and the Mexican steamship Baja California were at fault in the following, among other, respects:

1. In carelessly and negligently towing the Mexican steamship Campeche toward and to a point close by the anchored Lottie Carson.

2. In carelessly and negligently towing the Campeche toward and in the close proximity of the anchored Lottie Carson without giving careful, due or any regard to the existing circumstances and conditions.

3. In carelessly and negligently towing the Campeche toward and close to the anchored Lottie Carson without first giving any or proper warning to the said Lottie [6] Carson or her officers that such a maneuver was to be undertaken.

4. In carelessly and negligently attempting to tow

the Campeche past the Lottie Carson on the windward side.

5. In carelessly and negligently towing the Campeche at an excessive rate of speed without careful, due or any regard to the existing circumstances and conditions.

6. In carelessly and negligently letting go the towline which was fast to the stern of the Campeche and in casting said Campeche adrift at a time when there was grave danger that the said Campeche would collide with the Lottie Carson anchored nearby.

7. In carelessly and negligently letting go the Campeche and casting her adrift inside the harbor of Mazatlan when by so doing other vessels and property would be endangered.

8. In carelessly and negligently towing said Campeche farther into the harbor instead of out of the harbor, thus endangering other vessels and property located farther in the harbor.

9. In carelessly and negligently attempting to tow the Campeche farther into the harbor of Mazatlan.

10. In carelessly and negligently attempting to tow the Campeche with a single improperly rigged towline or hawser.

11. In carelessly and negligently failing to take any or proper precautions to prevent the Campeche from colliding with the Lottie Carson. [7]

12. In that said Mexican steamship Baja California at and prior to the time of said collision did

not have on watch proper and efficient officers or men properly stationed or attentive to their duties.

VIII.

That after the *Campeche* collided with the *Lottie Carson* effort was made by libelant and expenses and salvage costs were incurred to save the *Lottie Carson*, her fuel oil, stores, equipment, etc. from becoming a total loss. That libelant was unable to save the *Lottie Carson* but was largely successful in saving fuel oil, stores and certain equipment. These expenses were reasonably incurred and were approximately \$2,500 in amount. Libelant is not at this time fully informed as to the exact amount of the expenses and begs leave to amend to set out the facts in this respect when full information is obtained. That libelant was able to dispose of the wreck of the *Lottie Carson* for the sum of \$411.52.

IX.

That at the time of said collision libelant had on board the *Lottie Carson* certain cargo, a fishing net, food, drugs and other personal property, all of which was owned by him. That effort was made by libelant and expenses were incurred to save or salvage all of the same. That libelant was largely successful in this effort, and expenses were reasonably incurred in the approximate amount of \$750.00. Libelant is not at this time fully informed as to the exact amount of the expenses and begs leave to amend to set out the facts in this respect when full information is obtained.

X.

That at the time of said collision there was on board [8] the Lottie Carson certain cargo, scientific equipment, paraphernalia, machinery, tools, empty gasoline or oil drums which were not owned by libelant and for which libelant sues as bailee for the owners and subrogees. Some of said property was lost and some damage. The balance was salvaged or saved by reasonable incurring salvage costs and expenses in the approximate amount of \$7,000. That libelant is not at this time fully informed as to the exact total of expenses and salvage costs incurred, and begs leave to amend to set out the facts in this respect when full information is obtained.

XI.

That as a result of said collision libelant as owner of said Lottie Carson and of certain cargo, a fishing net, provisions, drugs, and other personal property, has sustained loss and damage consisting of loss of the said American gas screw Lottie Carson, and the loss of or damage to certain fuel oil, consummable stores, equipment, etc. on board said vessel, and expenses incurred in efforts to salvage and save said vessel together with her fuel oil, consummable stores and equipment, together with miscellaneous and incidental expenses and other damages not yet fully determined or ascertainable, and consisting of damage to and expenses incurred in saving or salvaging certain cargo, a fishing net, provisions, drugs and other personal property. That the exact amount of libelant's said damages has not yet been ascertained but libelant estimates and alleges that the

same will approximate the sum of \$60,000. That no part of the damages aforesaid has been paid and the whole thereof remains now due and owing from respondents to libellant.

XII.

Upon information and belief, that Cia Mexicana de [9] Navigacion del Pacifico, S. A. has no office or place of business within this district, but that there are now or will be during the pendency of process hereunder within this district certain goods, moneys, chattels, securities, credits and effects belonging to or in which said respondent owns an interest, to wit: certain goods, moneys, chattels, securities, credits and effects in the hands of Williams Dimond & Co.

XIII.

Upon information and belief, respondent alleges that he has no redress against said respondent Cia Mexicana de Navigacion del Pacifico, S. A. unless by process of attachment against the said goods, moneys, chattels, securities, credits and effects.

XIV.

That all and singular the premises are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the rules and practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the respondent Mexican steamship BAJA CALIFORNIA, her engines, machinery, tackle, apparel and furniture, and against respondent Cia Mexicana de Navigacion del

Pacifico, S. A. and each of them, and that the said respondents and all persons claiming to have any interest in said Mexican steamship BAJA CALIFORNIA, her engines, machinery, tackle, apparel and furniture, may be cited to appear and answer under oath all and singular the matters aforesaid and that in the event the said Cia Mexicana de Navigacion del Pacifico, S. A. cannot be found within this district or within the jurisdiction of this Honor-[10]able Court, said respondents' goods, moneys, chattels, securities, credits and effects may be attached in the hands of Williams, Dimond & Co., or wherever found, by process of foreign attachment to the sum of \$82,000, the sum sued ofor in this libel, with interest and costs, and that this Honorable Court may be pleased to decree to libelant and against respondents and each of them the damages aforesaid with interest and costs of said suit and that said respondent Mexican steamship BAJA CALIFORNIA, her engines, machinery, tackle, apparel and furniture, may be condemned and sold to pay the same and that libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

FARNHAM P. GRIFFITHS
McCUTCHEN, OLNEY, MAN-
NON & GREENE

Proctors for Libelant.

Let a writ of foreign attachment issue as prayed.

BEN HARRISON,

United States District Judge.

State of California

County of Los Angeles—ss.

Harold A. Black, being duly sworn, deposes and says:

That he is a member of the firm of McCutchen, Olney, Mannon & Greene, proctors for libelant herein, and makes this verification for said libelant for the reason that libelant is not within the City and County of San Francisco; that he has read the foregoing libel and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the source of his knowledge is memoranda prepared from interviews with witnesses and other documents and records supplied by libelant.

HAROLD A. BLACK

Subscribed and sworn to before me this 15th day of December, 1941

(Notarial Seal) **NANCY HANSEN**

Notary Public in and for the County of Los Angeles,
State of California [12]

INTERROGATORIES PROPOUNDED BY LIBELANT TO RESPONDENTS TO BE ANSWERED IN WRITING AND UNDER OATH:

1. Who was in charge of the navigation, management and towing operations of the BAJA CALIFORNIA on the 19th day of October, 1941, at the time the CAMPECHE was being towed by the BAJA

CALIFORNIA, giving his full name and office or position on the BAJA CALIFORNIA?

2. Was not the person who was in charge of the navigation and management and of towing operations at said time paid by and in the employ of respondent CIA MEXICANA de NAVIGACION del PACIFICO, S. A.?

3. Was not respondent CIA MEXICANA de NAVIGACION del PACIFICO, S. A. the operator of the BAJA CALIFORNIA prior to and at the time of the collision of the CAMPECHE with the LOTTIE CARSON on October 19, 1941, and if so:

(a) Attach copies of any and all written agreements, memoranda and letters setting out the terms under which said Baja California was being operated by respondent Cia Mexicana de Navigacion del Pacifico, S. A.

(b) If there were not writings state fully what the oral understanding or agreement was in respect thereto.

4. If respondent CIA MEXICANA de NAVIGACION del PACIFICO, S. A. was not the operator of said vessel, was said BAJA CALIFORNIA being handled, managed and/or navigated by said respondent, and if so:

(a) Attach copies of any and all written agreements, memoranda and letters setting out the terms under which said BAJA CALIFORNIA was being handled, [13] managed and/or navigated by respondent CIA MEXICANA de NAVIGACION del PACIFICO, S. A.

5. State fully the relationship or connection of CIA MEXICANA de NAVIGACION del PACIFICO, S. A. to the operation, handling and/or navigation of BAJA CALIFORNIA on the 19th day of October, 1941, prior to and at the time of the collision of the CAMPECHE with the LOTTIE CARSON; And if such relationship is contained in any writings, memoranda or letters kindly attach copies.

6. What kind of towline was used by the BAJA CALIFORNIA to tow the CAMPECHE on the 19th day of October, 1941, just prior to the collision of the CAMPECHE with the LOTTIE CARSON, and how was it rigged, and

(a) How long was the towline?

(b) How and to what was the towline made fast on the BAJA CALIFORNIA?

(c) How and to what was the towline made fast on the CAMPECHE?

7. Why was the towline let go and the CAMPECHE cast adrift at the time it was let go?

8. What was the purpose of towing the CAMPECHE into the harbor instead of out of the harbor and away from anchored vessels, and other property?

9. To what place or point was it the intention of the BAJA CALIFORNIA to tow the CAMPECHE?

10. At what speed was the CAMPECHE being towed by the BAJA CALIFORNIA?

11. State fully what the tidal, wind and weather conditions were at the time the CAMPECHE was

being towed by the BAJA CALIFORNIA, giving directions and strength of wind and tide.

**McCUTCHEN, OLNEY, MAN-
NON & GREENE**

Proctors for Libelant

[Endorsed]: Filed Dec. 15, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[14]

[Title of District Court and Cause.]

**MONITION AND CITATION AND WRIT OF
ATTACHMENT**

To the President of the United States of America

*To the Marshal of the United States for the South-
ern District of California, Central Division.*

GREETING:

Whereas, a libel has been filed in the United States District Court for the Southern District of California, Central Division, on the 15th day of December in the year of our Lord One Thousand Nine Hundred and Forty-one, by R. B. Hoffman, libelant, against the Mexican Steamship Baja California, her engines, tackle, apparel, and furniture, and Cia Mexicana de Navigacion del Pacifico, S. A., a corporation, respondents, in a cause of action, civil and maritime, to recover the sum of \$67,000.00, together with interest thereon, and praying that usual process and monition may issue and that all persons interested in said Mexican Steamship Baja California, her engines, tackle, apparel [15] and furniture, may be cited in general and special to answer the premises

and all proceedings being had, that the said Steamship Baja California, her engines, tackle, apparel and furniture, may be cited in general and special to answer the premises and all proceedings being had, that the said Steamship Baja California, her engines, tackle, apparel and furniture may, for the causes in said libel mentioned, be condemned and sold to pay the demands of the libelant, and praying that process may issue against respondent Cia Mexicana de Navigacion del Pacifico, S. A. a corporation, pursuant to the rules of practice of this court, and that its goods and chattels in this district may be attached to compel its attendance, and that if none be found that its credits and effects be attached to compel its attendance in case it cannot be found.

You Are Hereby Commanded to attach the said Mexican Steamship Baja California, her engines, machinery, tackle, apparel and furniture, and to detain the same in your custody until further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, and that they be and appear before the said District Court in the Federal Building, in the City of Los Angeles, on the 5th day of January, 1942, at the hour of 10 o'clock A. M. then and there to interpose a claim for the same and to make their allegations in that behalf. And We Do Hereby Further Empower You and Strictly Charge and Command You, the said Marshal, that you cite and admonish the said respondent, Cia Mexicana de Navi-

gacion del Pacifico, S. A. a corporation, if it shall be found in your district, that it be and appear before the said District Court at the hereinbefore mentioned time and place, then and there to answer said libel and make its allegations in ~~that~~ ^{the} behalf. And if said respondent, Cia Mexicana de Navigacion del Pacifico, S. A., cannot be found in your district, we further command you to attach its goods and chattels, and that if none be found, that you attach its monies, securities, [16] and credits and effects in your district to the amount sued for, and that you cite and admonish Williams, Dimond & Co., to be and appear before the said District Court at the Federal Building in the City of Los Angeles on the 5th day of January, 1942, then and there to answer on oath concerning said respondent's property and credits and effects in its hands, and have you then and there this writ with your return thereon.

Witness, the Honorable Ben Harrison, Judge of said Court in the City of Los Angeles, in the Southern District of California, this 15th day of December, in the year of our Lord One Thousand Nine Hundred and Forty-one.

[Seal]

R. S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy Clerk.

FARNHAM P. GRIFFITHS

McCUTCHEN, OLNEY, MANNON & GREENE,

Proctors for Libelant.

In obedience to the within Monition and Cita-

tion and Writ of Attachment, I attached the Mexican Steamship "Baja California," her engines, tackle, apparel and furniture, on the 15th day of December, 1941, and have given due notice to all persons claiming the same that this Court will, on the 5th day of January, 1941 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Dated: December 15, 1941.

Marshal's Fees\$4.30

Mileage 1.58

Expenses

Total\$5.88

ROBERT E. CLARK,

U. S. Marshal.

By W. S. SWEENEY,

Deputy.

[Endorsed]: Filed Dec. 24, 1941. [17]

[Title of District Court and Cause.]

SUGGESTION BY THE REPUBLIC OF MEXICO

Dr. Francisco Castillo Najera, Ambassador to the United States for the Republic of Mexico, by Rodolfo Salazar, The duly accredited representative of the said Ambassador, and of the Republic of Mexico and the Government thereof, and Consul of

said Government for Los Angeles, California, through Ben Van Tress and James R. Jaffray, attorneys and proctors appearing specially [18] for the Mexican steamship Baja California, her engines, tackle, apparel and furnishings, and appearing specially for the said Republic of Mexico and its Government, and without accepting the jurisdiction of the above named court for any other purpose, suggests to the United States District Court for the Southern District of California, Central Division, that the said steamship Baja California, at all the times mentioned in the libel was, and now is owned by the Government of the Republic of Mexico, and in its possession, carrying the mail by direction of said Republic of Mexico, and being used for said Republic of Mexico by its agents, wholly manned and operated by a crew employed by and paid by said government, and under the Control of said Government, and engaged in transportation of cargoes between the ports of said Republic of Mexico and elsewhere.

Wherefore, it is respectfully suggested and prayed that said Steamship be released from any seizure and declared immune from process.

BEN VAN TRESS and
JAMES R. JAFFRAY.

By BEN VAN TRESS. [19]

State of California,
County of Los Angeles—ss.

Rodolfo Salazar, being first duly sworn, deposes and says:

That he is the duly accredited representative of Dr. Francisco Castillo Najera, Ambassador to the United States for the Republic of Mexico, and of the Republic of Mexico and the Government thereof, and Consul of said Government for Los Angeles, California; that he has read the within Suggestion by the Republic of Mexico and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

R. SALAZAR.

Subscribed and Sworn to before me this 23rd day of December, 1941.

[Seal]

BEN VAN TRESS.

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Dec. 24, 1941. [20]

[Title of District Court and Cause.]

AMENDED ANSWER TO "SUGGESTION BY
THE REPUBLIC OF MEXICO"

Now comes R. B. Hoffman, libelant in the above entitled cause, and answering unto the purported "Suggestion by the Republic of Mexico", admits, denies and alleges as follows:

Denies that any party can appear specially, or otherwise, on behalf of the Steamship Baja California. Alleges that he is ignorant of the owner-

ship of the steamship Baja California now or at any of the times mentioned in the libel, and demands strict proof of the allegation that the Republic of Mexico owned the vessel during all or any of said times, if pertinent.

Denies that the steamship Baja California was in the possession of the Republic of Mexico at any of the times mentioned [21] in the libel. Alleges that he is ignorant as to the allegation that the steamship Baja California was at any of the times mentioned in the libel carrying mail by direction of the said Republic of Mexico, and demands strict proof thereof, if pertinent.

Admits and alleges that said steamship Baja California was at all times mentioned in the libel and at the time of service of process herein operating as a common carrier for hire of cargo and passengers between the ports of the Republic of Mexico and the United States.

Denies that the said steamship was at any of the times mentioned in the libel or at the time of service of process herein being used for or in the service of the government of the said Republic of Mexico. Denies that the said steamship was at any of the above mentioned times wholly or in part manned or operated by a crew employed by or paid by the said Republic or under the control of said Republic.

Except as hereinabove expressly admitted, denies the allegations of the said purported "Suggestion", each and every, all and singular, and the whole thereof.

Alleges on information and belief that Compania Mexicana de Navigacion del Pacifico S. de R. F., one of the respondents herein, was at all times mentioned in the libel, ever since has been and now is, a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico. Alleges that at all of said times said corporation operated, controlled, navigated and possessed said steamship Baja California.

Wherefore, libelant prays that said purported "Suggestion" be given no recognition by this Honorable Court, that the claim for release of the vessel on the ground of sovereign immunity be denied, and that the custody of the said steamship [22] Baja California be retained by the United States Marshal.

Dated: Los Angeles, California, January 19th, 1942.

McCUTCHEN, OLNEY,
MANNON & GREENE,
JO HENDERSON,
Proctors for Libelant.

It Is Hereby Stipulated that the foregoing Amended Answer to "Suggestion by the Republic of Mexico" may be filed in the above entitled action, and that the same shall supersede for all pur-

poses the Answer to "Suggestion by the Republic of Mexico".

McCUTCHEN, OLNEY,
MANNON & GREENE.

JO HENDERSON,

Proctors for Libelant.

BEN VAN TRESS,

JAMES R. JAFFRAY,

Proctors for Republic of
Mexico.

It is so ordered this 28th day of January, 1942.

PAUL J. McCORMICK,

Judge of the above entitled
Court. [23]

State of California,

County of Los Angeles—ss.

Jo Henderson, being first duly sworn, deposes and
says:

That he is an attorney-at-law duly admitted and
licensed to practice in the State of California and in
the above entitled court, associated with McCutchen,
Olney, Mannon & Greene, proctors for libelant in
the above entitled matter, on whose behalf he makes
this verification.

That he makes this verification for the reason that
said libelant is not present or now residing in the
Southern District of California; that he has read
said Amended Answer to "Suggestion by the Re-
public of Mexico" and knows the contents thereof;
and that the same is true of his own knowledge, ex-
cept as to matters which are therein stated on infor-

mation or belief, and as to those matters that he believes it to be true.

JO HENDERSON.

Subscribed and sworn to before me this 19th day of January, 1942.

[Notarial Seal] **NANCY HANSEN,**

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 28, 1942. [24]

[Title of District Court and Cause.]

STIPULATION

On the understanding hereinafter set forth it is stipulated that the motion to strike the "Suggestion by the Republic of Mexico" dated January 3, 1942, be withdrawn by libelant without prejudice; that notice of the hearing on said "Suggestion by the Republic of Mexico" and libelant's answer thereto is waived, and that said hearing be held at the courtroom of the above court at 10:00 o'clock in the forenoon of January 29, 1942, before the Honorable Paul J. McCormick, Judge presiding.

Said understanding hereinbefore mentioned is that:

A The Republic of Mexico shall offer and the court shall receive in evidence at said hearing the following: [25]

1) Original document in the Spanish language dated October 3, 1941, as said Republic's Exhibit "A";

2) English translations of said Exhibit "A", as said Republic's Exhibits "B-1" and "B-2", the former prepared by the libelant and the latter by the said Republic;

3) Certificate No. 6615, United States of America Department of State, dated December 23, 1941, as said Republic's Exhibit "C";

4) Form of authorization dated December 23, 1941, by F. Castillo Najera in favor of Rodolfo Salazar, as said Republic's Exhibit "D";

5) Certificate of registry or other document calculated to prove title to said steamship Baja California in the Republic of Mexico, as said Republic's Exhibit "E", together with translations of the same;

6) Official records of the said steamship Baja California indicating at what times from the date of the collision referred to in the libel herein to the date of seizure of the said steamship under process herein the said steamship was carrying mail for the said Republic, as said Republic's Exhibit "F";

B The libelant may offer and the court shall receive in evidence at said hearing the following:

1) Copies or duplicate originals of the manifests and bills of lading of the steamship Baja California which are now in the possession of the libelant, and copies or duplicate originals of additional manifests, namely, all those manifests concerning the carriage of [26] cargo by the said Baja California on and after the time of the collision until the time of the seizure under process herein, the said Republic agreeing to furnish libelant with the said manifests on or before the hearing on January 29, 1942, if the

same are in its possession or on board the said Baja California or available to it.

2) Certain articles of the Law of General Lines of Communication of the Republic of Mexico, effective February 19, 1940, and that for this purpose the translation of the aforementioned law prepared and published by the Asociacion de Empresas Industriales y Comerciales or copies of the articles so translated shall be received in evidence by the court as the equivalent of the original Mexican text of the law, and that no certification, authentication or other proof shall be required of the law, or of the fact that it was at all times mentioned in the libel and now is in effect.

3) Translations of the said Republic's Exhibit "E".

C That the Republic of Mexico admits for all purposes: The steamships Campeche and Baja California were delivered by the Mexican Government on August 27, 1941, to the Cia Mexicana de Navegacion del Pacifico, respondent herein, a corporation duly organized and existing under the laws of Mexico. The said Baja California and the said Campeche were, on and after October 3, 1941, including the time of the collision referred to in the libel herein, operated by the Cia Mexicana de Navegacion del Pacifico under the terms and conditions of the contract designated said Republic's Exhibit "A". The said Baja California was thereafter and at the [27] time of the seizure under process herein, being operated by the said Cia Mexicana de Navegacion del Pacifico under the terms and conditions of the contract designated

said Republic's Exhibit "A". The said contract was on October 3, 1941, its effective date, and from thenceforth and at the time of seizure of the said Baja California under process herein the only agreement covering the rights and obligations of the parties with respect to the ships therein named.

D That the said Republic of Mexico shall be deemed to have called as its witness Martin Gavica Oropesa, the master of the said Baja California, and he shall be deemed to have testified as follows:

At the time of the collision referred to in the libel herein the Baja California was in the harbor of Mazatlan for the purpose of unloading a general cargo from the United States consigned to various private firms and individuals. No passengers were aboard. Certain cargo was unloaded on the following day; no new cargo was taken aboard; and the vessel thereafter proceeded to La Paz with general cargo and one family aboard as passengers. The husband in this family was a government inspector, and he and his family were transferred from the Campeche to the Baja California because of the inability of the former ship to continue its scheduled voyage. The amount of the fares paid by the members of this family does not appear in the records of the Baja California.

The Baja California discharged cargo from the United States at La Paz and thence proceeded to Guaymas, for flour, and thereafter to Toluobampo where 200 tons of sugar were taken aboard. The Baja California discharged this sugar at Santa Rosalia and then put it at San Jose Island for salt. The flour

from Guaymas was [28] unloaded at San Jose del Cabo and a shipment of dried meat was loaded for Manzanillo. The next stop was Bocatomatics where machinery for Manzanillo was taken aboard. At Manzanillo all cargo was discharged. The vessel then picked up some salt for Manzanillo at Carmen Island and brought it back to Manzanillo. There the Baja California loaded general cargo for the present voyage north to the United States. Included in this cargo was a box of uniforms for the Mexican Consulate at San Francisco.

The Baja California put in on the trip north at Mazatlan, where copra for San Pedro and general cargo for ~~San Jose~~ del Cabo and Ensenada were taken aboard. Also approximately 40 passengers were carried from Mazatlan, some disembarking at San Jose del Cabo and the rest at Ensenada, with about 10 new passengers from San Jose del Cabo to Ensenada. Among the passengers for Ensenada were a Mexican government inspector of the department in charge of fishing and a chauffeur for the Ensenada office of the same department. Before reaching Ensenada the vessel stopped, as previously indicated, at San Jose del Cabo, where general merchandise was unloaded and shark fins and shark liver oil for San Pedro taken aboard. At Ensenada more general merchandise was unloaded, nothing was loaded, and the Baja California then proceeded to San Pedro with the general cargo listed in the inward foreign manifest for San Pedro.

With the exception of the box of uniforms for the San Francisco Consulate, all of the cargo carried

on these voyages was privately owned. The shippers paid the usual tariff rates thereon, and the same was neither consigned by or to said Republic of Mexico. The box of uniforms was carried for 50% of the regular rate. Likewise, all passengers paid the regular fares with the exception of the government inspector and employee disembarking [29] at Ensenada who paid 50% of the regular fare. The fares paid by the family transported from Mazatlan to La Paz do not appear in the records of the Baja California. Mail was carried without charge by the Baja California at the times indicated by the official records of the Baja California, which are to be offered in evidence at Exhibit "F".

All moneys received by me from the operation of the Baja California were accounted for to Mr. Abaunza, as manager of the Cia Mexicana de Navegacion del Pacifico, and all expenses (as defined in Paragraph "Third" of Exhibit "A") incurred in operating the said Baja California, including the salaries and wages of its officers and crew who were employed by the Cia Mexicana de Navegacion del Pacifico, and the cost of supplies necessary for the operation of said ship, were paid for with money delivered by the said Cia Mexicana de Navegacion del Pacifico.

E No evidence, oral or documentary, shall be offered by the parties or received by the court other than that evidence, the presentation of which is herein provided for.

F The originals of all exhibits may be removed thirty (30) days from date, provided that photo-

static copies of the same be delivered to the Clerk to replace the originals. The libelant agrees to bear the expense of obtaining photostatic copies of the manifests and bills of lading. On filing said photostatic copies they shall be effective for all purposes as originals.

G That oral argument be waived, that the brief designated "Opening Brief of the Republic of Mexico", a copy [30] of, which was received by the libelant on January 23, 1942, shall be considered said Republic's opening brief, that the libelant shall have seven (7) days from the date of the hearing to file its reply brief, and that the Republic of Mexico have three (3) days after libelant files its reply brief within which to file its reply thereto.

Dated at Los Angeles, California, January 27, 1942.

BEN VAN TRESS and
JAMES R. JAFFRAY,
By JAMES R. JAFFRAY,

Proctors for the Republic of
Mexico.

McCUTCHEN, OLNEY,
MANNON & GREENE.
JO HENDERSON,

Proctors for Libelant.

It Is So Ordered this 28th day of January, 1942,
subject to the right, if any, of the United States to

appear at the hearing on Jan. 29, 1942, and pursue any ~~available~~ action in this proceeding.

PAUL J. McCORMICK,

Judge of the above entitled
court.

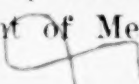
[Endorsed]: Filed Jan. 28, 1942. [31]

[Title of District Court and Cause.]

SUGGESTION BY THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

To the Honorable United States District Court
for the Southern District of California:

I, Wm. Fleet Palmer, United States Attorney for the Southern District of California, acting under the direction of the Attorney General of the United States, respectfully bring to the attention of the Court that the Attorney General of the United States has received from the Secretary of State of the United States a communication, a copy of which is attached hereto as Exhibit "A" and hereby [32] incorporated herein by reference, to the effect, that the Secretary of State has been requested by the Ambassador of the Republic of Mexico to bring to the attention of this Honorable Court, certain diplomatic representations as to the status of the Steamship Baja California and its owners. The representations, made on behalf of the Government of Mexico, are set forth in the



copy in translation of a communication dated January 6, 1942, and a copy of its enclosure from the Ambassador of the Republic of Mexico, which are attached hereto as Exhibit "B" and hereby incorporated herein by reference.

In bringing this matter to the attention of the Court, the United States does not intervene as an interested party, nor do I appear either on behalf of the United States or for the Government of Mexico, and I present the suggestion as a matter of comity between the United States Government and the Government of Mexico for such consideration as this Court may deem necessary and proper.

WM. FLEET PALMER,
United States Attorney.

Los Angeles, California, January 28, 1942. [33]

EXHIBIT "A"
Department of State
Washington

Copy

In reply refer to
Le 311.1253 Baja California/4
The Honorable
Francis Biddle
Attorney General

My dear Mr. Attorney General:

I enclose for your information a copy in translation of a note dated January 6, 1942 and a copy of its enclosure from the Mexican Ambassador in this city relating to a libel filed in the United States Dis-

trict Court for the Southern District of California (Central Division) against the steamship Baja California, on account of damages sustained by the pilot boat Lottie Garson (or Carson) in a collision with steamship Campeche in the harbor at Mazatlan, Mexico.

You will observe that the Ambassador states that

“The apparent basis of the attachment procedure lies in the fact that both vessels, the Campeche and the Baja California, are operated by the ‘Compania Mexicana de Navegacion del Pacifico, S. de R.L.’ But, in reality, the two ships belong to the Government of Mexico as is proved by the operating contract, a copy of which is enclosed with the present note.”

The ambassador desires that through you instructions be given for the purpose of having the District Court dismiss the libel.

Although this Department heretofore generally has declined to comply with such a request when the vessel, as in this case, is engaged in the carrying of merchandise for hire, it would be appreciated if in this instance you would instruct the United States Attorney at Los [34] Angeles to appear before the above-mentioned court and to report to it the position of the Mexican Government as set forth in the Embassy's note.

It may be pointed out that it has been ascertained informally that the convention to which the Ambassador refers in his note is the Multilateral Convention signed at Brussels on September 23, 1910 for

the unification of certain rules of law respecting collisions between vessels. Article II reads

"If the collision is accidental, if it is caused by force majeure, or if the cause of the collision is left in doubt, the damages are borne by those who have suffered them.

"This provision is applicable notwithstanding the fact that the vessels, or any one of them, may be at anchor (or otherwise made fast) at the time of the casualty."

The provision just quoted does not relate to the question of the immunity of a foreign sovereign from suit but rather provides a defense, in appropriate cases, to be set up at the trial. Moreover, this convention is not in force as to this Government. It is still pending before the Senate with a view to its advice and consent to ratification.

The cases of the Navemar and the San Ricardo to which the Ambassador refers may be found reported in 17 F. Supp. 495 and 647, 18 F. Supp. 153, 303 U. S. 68; and 99 F. (2d) 935.

Sincerely yours,

For the Secretary of State:

(Signed) A. A. BERLE, JR.,
Assistant Secretary.

Enclosure:

From the Mexican Ambassador
dated January 6, 1942
with enclosure. [35]

EXHIBIT "B"

(Translation)

Copy

Embassy of Mexico.

215

His Excellency Cordell Hull
Secretary of State

Washington, D. C.
January 6, 1942

Mr. Secretary:

On instructions from my Government, I have the honor to submit the following facts for Your Excellency's consideration to the end that, if possible, the Department of State under your worthy direction may give the pertinent instructions, through the Attorney General of the United States of America, for the purpose of having the District Court of California, with jurisdiction in the port of Los Angeles, lift the attachment which it has ordered against the steamship "Baja California" belonging to the Government of my country.

Around the 19th of October, 1941, the steamship "Campeche"—at anchor in the Mexican port of Mazatlan—had a fire which made necessary certain maneuvers, during which a collision with the American pilot boat "Lottie Garson," occurred through the fault of its captain.

Subsequently, on the petition of the legal representative of the "Lottie Garson," the District Court with jurisdiction in the port of Los Angeles, United States of America, issued a writ for the attachment of the steamship "Baja California"—anchored in that port—for the purpose of exercising

over it the liabilities imputed to the steamship "Campeche" on account of the aforesaid collision which occurred in the port of Mazatlan.

The apparent basis of the attachment procedure lies in the fact that both vessels, the "Campeche" and the "Baja California," are operated by the "Compania Mexicana de Navigacion del Pacifico, S. de R.L." But, in reality, the two ships belong to the Government of Mexico, as is proved by the operating contract, a copy of which is enclosed with the present note. [36]

In the face of this situation, my Government believes it pertinent to invoke the rule accepted by international law which establishes the immunity of vessels belonging to a foreign state against proceedings issuing from domestic courts. In this respect, the very recent decisions in the "Navemar" and "San Ricardo" cases are recalled.

The "Navemar" case specifically supports Your Excellency's direct intervention to obtain the immediate recognition of the immunity of the vessel "Baja California" for the purpose of avoiding the sequel of judicial proceedings, necessarily slow, which will cause unnecessary injury to all the contending parties, and in the end, to the Mexican State.

The action of the Department of State is likewise justified in view of the fact that the Court which ordered the attachment of the "Baja California" disregarded the stipulations of the convention in effect between the two countries with respect to collision—particularly the provisions of paragraph 2 of

Article II—since no joint liability can exist between the attached vessel and the “Campeche” for a collision which occurred in Mexican territorial waters.

The Government of Mexico believes that expenses and difficulties of moment could be avoided, expenses and difficulties of use to no one, if the Attorney General of the United States of America should be instructed to obtain, by the appropriate means, a nullification of the aforesaid writ of attachment, issued by the District Court with jurisdiction in Los Angeles, California, in view of the fact that the said judicial order may be considered as a violation of the provisions of an international treaty in force and that, in addition, it represents a disregard of the rule of immunity from the jurisdiction of the domestic judicial authorities which protects vessels belonging to a foreign State.

In thanking Your Excellency for the attention which you may be good enough to give this matter, I beg to emphasize the urgency [37] which the settlement of this case has for the interests of the Government of Mexico.

I take the opportunity to renew [etc.]

F. CASTILLO NAJERA

Ambassador

Enclosure:

Copy of contract.

TR:AVA

[Endorsed]: Filed Jan. 28, 1942. [38]

[Title of District Court and Cause.]

**STATEMENT OF LIBELANT'S POSITION
WITH RESPECT TO THE SUGGESTION
BY THE UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA.**

Now comes R. B. Hoffman, libelant in the above entitled action, and through his proctors, states his position with respect to the Suggestion By The United States Attorney For The Southern District of California as follows:

Respectfully submits that the said Suggestion does not constitute a recognition and allowance by the United States Department of State of the claim of sovereign immunity of the steamship BAJA CALIFORNIA as requested in the Note written by the Honorable F. Castillo Najera, Mexican Ambassador to the United States, to the Honorable Cordell Hull, Secretary of State, on January 6, 1942. [39]

Respectfully submits that the Department of State has expressed its desire in the Note of the Honorable A. A. Berle, Jr., Assistant Secretary of State to the Honorable Francis Biddle, Attorney General, attached to the said Suggestion, that the claim of the Republic of Mexico be judicially determined by this Court.

In answer to the statements of the Honorable F. Castillo Najera in his Note to the Secretary of State, libelant respectfully admits, alleges and denies as follows:

(1) Denies that the question of the fault of the various vessels involved in the collision is relevant to the hearing on the Mexican Government's claim of sovereign immunity, but states that libelant's position with respect to those matters are fully set forth in the libel herein, to which the Court may refer if it so desires.

(2) Denies that the provision of the international convention referred to by the Ambassador is relevant to the hearing on the question of sovereign immunity.

(3) Alleges that libelant is ignorant of the ownership of the steamship **BAJA CALIFORNIA** and **CAMPECHE**, and demands strict proof of the statement that the two ships belong to the Government of Mexico.

(4) Denies that there is any rule of international law accepted by the Courts of the United States which requires the relinquishment of jurisdiction of a vessel merely because it is owned by a foreign state, in support of which contention libelant proposes to submit authorities to this Court in its Brief to be filed at a subsequent date. [40]

(5) Neither admits nor denies any of the other statements in the said Note, but demands strict proof of all representations contained therein which are relevant and material to the hearing on the Suggestion By The United States Attorney For the Southern District of California.

Dated: January 29, 1942.

R. B. HOFFMAN

By: JO HENDERSON

McCUTCHEN, OLNEY, MAN-
NON & GREENE [41]

**MEMORANDUM OF POINTS AND AUTHOR-
ITIES ON THE EFFECT OF THE SUG-
GESTION BY THE UNITED STATES AT-
TORNEY FOR THE SOUTHERN DIS-
TRICT OF CALIFORNIA.**

Unless our State Department recognizes and al-
lows the claims of sovereign immunity of a foreign
state, it is acting only as a conduit in transmitting
the communication of the duly accredited repre-
sentative of the foreign state to the court under
whose process the vessel is being detained, and the
question of the status of that vessel is one for
judicial determination.

Katingo Hadjipatera

(S.D. N.Y., 1941) 1941 A. M. C. 581, aff'd.
(C.C.A. 2d, 1941) 1941 A. M. C. 588, cert.
den. by United States Supreme Court
(1941) 1941 A. M. C. 1260

In this case the Suggestion filed by the United
States Attorney for the Southern District of New
York concluded with the following statement, as
does the suggestion of the honorable Wm. Fleet
Palmer herein:

"In bringing this matter to the attention of
the Court, the United States does not intervene

as an interested party, nor does the undersigned appear either for the United States or for the Government of the Kingdom of Greece, but the undersigned presents this suggestion as a matter of comity between the United States Government and the Government of the Kingdom of Greece for such consideration as this Court may deem necessary and proper.' "

The court, being uncertain as to the precise effect of this Suggestion, caused a telegraphic inquiry to be sent to the Department of State, which was answered by the Acting Secretary of State, Sumner Welles, whose letter is quoted in [42] the opinion. This letter stated that the Department of State "feels that the question of the status of the Katingo Hadjipatera is one for judicial determination." The court thereupon heard the evidence presented by both sides, and denied the claim of the foreign sovereign.

The Ioannis P. Goulondris (S.D. N.Y., 1941)
39 Fed. Supp. 630

In denying the Greek Government's claim of sovereign immunity, presented by a Suggestion, similar in form to that employed in the preceding case, the court said,

"The Department of State in transmitting the communications from the Greek Minister has merely acted as a conduit. The mere fact that the Department of State transmits a claim of immunity of a foreign government is not in and of itself a recognition of a plea of im-

munity. Had the Department of State accepted as true the statements of the Greek Minister the Court would accept such action as final and binding upon the Court and would immediately relinquish jurisdiction. The facts here, however, are quite different as has been pointed out. The State Department merely states that the claim of the Greek Minister is 'entitled to the respectful consideration of the Court.' It does not appear therefore that the claim has been 'recognized and allowed' by the State Department. *The Navemar*, 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667. Since it appears that the facts are in issue, a hearing should be had. See *The Katingo Hadjipatera*, 40 F.Supp. 546, 1941 A.M.C. 581, affirmed on opinion below, 2 Cir., April 23, 1941, 119 F.2d 1022.

Motion denied. Settle order on notice."

If the Department of State recognizes and allows the claim of sovereign immunity, the court must release the vessel. [43]

The Navemar (1938) 303 U.S. 68, 74, 58 S.Ct. 432, 434, 82 L.Ed. 667.

"If the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."

However, when the State Department does recog-

nize and allow the claim of sovereign immunity, its Note and the Suggestion are aptly worded.

The Maliakos

(1941) 1941 A.M.C. 1737.

In this case the Note of the Secretary of State, presented with the Suggestion, said that the State Department "accepts as true the statements of fact contained in the Greek Minister's notes". The court communicated directly with the State Department in order to confirm its construction of the Note and received a letter from Secretary of State Cordell Hull which stated,

"In my letters of August 25, 1941, to the Honorable Francis Biddle, Acting Attorney General, I stated that the statements of fact contained in the notes of the Greek Minister at Washington were accepted as true. By this statement I intended to convey the understanding that I recognized as warranted the claim of immunity made by the Greek Minister with reference to these steamships."

Dated: January 29, 1942.

Respectfully submitted,

JO HENDERSON

McCUTCHEN, OLNEY, MAN-
NON & GREENE

[Endorsed]: Filed Jan. 29, 1942. [44]

REPORTER'S TRANSCRIPT
of
PROCEEDINGS ON TRIAL

Appearances:

Messrs. McCutchen, Olney, Mannon & Greene,
By Jo Henderson, Esq.,
Proctors for Libelant.

Ben Van Tress, Esq.,
and
James R. Jaffray, Esq.,
Proctors for Respondent.

Marvin Dean, Esq.,
Assistant United States Attorney present
for Wm. Fleet Palmer, Esq., United States
Attorney.

Hon. Paul J. McCormick, Judge Presiding. [46]

Los Angeles, California, Thursday,
January 29, 1942. 10 A.M.

Mr. Dean: Your Honor, I should like to have it noted in the record that the United States Attorney appears as a matter of comity between the Government of Mexico and the Government of the United States to present to the court the documents which have been attached to the "Suggestion" which has been filed by the United States Attorney.

The Court: The record will so show.

Mr. Henderson: If the court please, we have served or delivered to the United States Attorney

a copy of a statement of libelant's position with respect to the "Suggestion" by the United States Attorney for the Southern District of California, to which is attached a memorandum of points and authorities on the effect of the "Suggestion" by the United States Attorney for the Southern District of California, and wish to file that at this time. The same carries an admission of service from Mr. Van Tress, as proctor for the Republic of Mexico.

The Court: I would like to read that Maliakos case.

(Short intermission.)

The Court: 303 United States, please.

(Short intermission.)

The Court: Proceed, gentlemen. I have read these cases. [49]

Mr. Henderson: If the court please, we have a proceeding here which is, in a sense, sui generis. The Ambassador from the Republic of Mexico has authorized Mr. Salazar, the Mexican Consul in Los Angeles, to appear on his behalf by a form of authorization dated December 23, 1941, a copy of which is on file with this court. Mr. Salazar is in court with his counsel, Mr. Van Tress and Mr. Jaffray. He has filed a "Suggestion by the Republic of Mexico" presenting on behalf of that Republic and the Mexican Ambassador the position of the Republic with respect to the question of sovereign immunity. In addition, the Mexican Ambassador has made certain representations to the Department of State which have been transmitted

from the Department of State through the United States Attorney to this court. Mr. Dean, representing William Fleet Palmer, United States Attorney for the Southern District of California, was in court at the commencement of this proceeding and he has now left. I presume that he has presented the "Suggestion" and does not desire to present any further evidence on the question or any authorities to the court.

We have entered into a stipulation with proctors for the Republic of Mexico in pursuance of which the trial of this issue would go forward. That stipulation was filed yesterday and an order in pursuance of it was entered by the court. We presume that it will be in order for the Mexican Consul, Mr. Salazar, to proceed with the hearing on the [50] "Suggestion" filed by the United States Attorney as well as the "Suggestion" filed on behalf of the Republic of Mexico, and these two hearings may be consolidated and the stipulation extended to cover both of them.

Is that agreeable to you, gentlemen?

Mr. Jaffray: We so stipulate; yes.

Mr. Henderson: Then, may we suggest that the case go forward, the opening arguments be waived by both parties, Messrs. Van Tress and Jaffray appearing on the purported "Suggestion by the Republic of Mexico" and the "Suggestion" filed by the United States Attorney, in pursuance of the authorization from the Mexican Ambassador in favor of Mr. Salazar?

Mr. Jaffray: If the court please, Mr. Henderson, have you filed the stipulation?

Mr. Henderson: We have.

Mr. Jaffray: Then, if the court please, pursuant to the stipulation, which provides for the offering of certain matters, certain documents, we will then proceed to make the offers. On page 2 of this stipulation, the first, as named in the stipulation, as Exhibit A, is a contract in Spanish which we offer as Exhibit A.

The Clerk: Respondents Exhibit A.

Mr. Jaffray: We then offer as Exhibit B the Libellant's translation of the contract, Exhibit A, and as Exhibit B-1, that is, and Exhibit B-2, the Republic's translation, bound [51] in one cover, as the true translations of the contract.

RESPONDENT'S EXHIBIT B-1

Libellant's translation of Contract, Exhibit A

Contract for the management and business operation of the steamships "Campeche" and "Baja California", entered into by the C. (Citizen) General of Division Heriberto Jara, Secretary of the Navy, representing the Executive of the Union, and Mr. Gonzalo Abaunza, in his capacity as General Manager of the Compania Mexicana de Navegacion del Pacifico, S. de R.L. (Society of Limited Responsibility), (incorporation) of which was proved by a certified copy of the charter (organizing document) of the Company, drawn up before Notary Public No. 49, Atty. Manuel Andrade, of this city,

Respondent's Exhibit B-1 (Continued)

under date of October 3rd of the present year, and which is subject to the following

PROVISIONS

First:—The Department of the Navy authorizes the Compania Mexicana de Navegacion del Pacifico, S. de R.L., which hereinafter will be designated as "The Company", to institute a navigation service on the high seas, along the coasts and rivers, between foreign ports, and between certain ports and others. The company declares that it will begin business with a capital of \$100,000.00, One Hundred Thousand Pesos for the establishment and operation of the service being granted to them.

Second:—The Company will begin the navigation service, referred to in the above provision, with the national steamships "Campeche" and "Baja California", which the Federal Government delivered to Mr. Abaunza under the date of August 27th last, in accordance with the record of proceedings and related documents attached hereto, which will form an integral part of this contract, in order that the company may commercially operate and handle these vessels, guaranteeing the fulfillment of all obligations which it incurs by virtue of this same contract, as well as any damages which may be caused by breach of the same by filing a bond of 30,000.00 Thirty Thousand Pesos, which it will execute to the entire satisfaction of the Treasury of the Federation within eight days following the date of signing of this contract.

Respondent's Exhibit B-1 (Continued)

Third:—The Company binds itself to deliver 50%, fifty percent, of the net profits obtained to the Federal Government. By net profits will be understood that amount which remains after subtracting the total expenses from the gross income. The following will be considered as expenses: Wages, rental of offices in Mexico and in places where offices or branches may be established, the upkeep of the ships, their repairs and insurance premiums on same, the payroll of the crew, the general office expenses, the loading and unloading and other handling on board, taxes and port costs, and other expenses connected with the management and operation of the ships. Taking into consideration the fact that the above-mentioned ships are in need of important repairs in order to be put into navigable condition, it is expressly agreed upon that those repairs which are indispensable for their safety and good service are to be commenced at once and then gradually those (repairs) which are necessary for their improvement and proper maintenance.

Fourth:—The Federal Government will retain absolute ownership in the vessels, without further restrictions than those set forth in this contract.

Fifth:—The Company promises to insure the said ships against all risks, and to keep in operation the policies respective insurance contracts for the duration of this contract.

Sixth:—The Company, upon receipt of the said

Respondent's Exhibit B-1 (Continued)

ships, will sign the documents of delivery (transfer), the inventories and corresponding appraisals which will be appended to this contract, and it will not be held responsible for any liabilities or assets, even those which are privileged, which are outstanding against the said ships, contracted previous to the date on which each of these ships was transferred. The details of transfer will be carried out by a commission composed of two representatives of the Department of the Navy and two of the Company.

Seventh:—In order to increase the floating material (the number of ships?) See Prov. 9 below and to improve the service of navigation, the Company will establish a sinking fund with 5%, five percent, of the annual net profits.

Eighth:—The Company will obtain from the Department of Communications and Public Works the approval of its rate schedules, promising to advise the Department of the Navy, with advance notice of 10 days for its due approval, of the routes to be taken by the vessels in their commercial operation.

Ninth:—The vessels which will be acquired in any manner in the future, or which may be constructed out of the sinking fund mentioned in Provision 7 of this contract, will become the property of the Federal Government and of this Company in equal shares, and with respect to the same they will have the capacity of co-owners as far as any legal effects are to be considered.

Respondent's Exhibit B-1 (Continued)

Tenth:—The Company promises to enter into a contract with the proper federal department relative to the transportation of mail, printed matter, parcels and other postal material sent through the Post Office.

Eleventh:—The Company promises to furnish transportation on board the vessels of this line to the Chiefs and Officials of the national Army and Navy, as well as to employees of the Federal Government who travel on official business, charging only fifty percent of the fare fixed by the schedules approved by the Secretary of Communications and Public Works.

Free passage will be allowed to the students of the schools of the Merchant Marine, as well as to lighthousekeepers and their families, while traveling on official business. Troops of the national Army and Navy will be transported on board the said vessels at 50% fifty percent discount on second-class fares. These privileges do not exclude the franchises specified in Article 118 of the Law of General Means of Communications.

Twelfth:—For the carrying out of the provisions referred to in the above clause relative to the transportation of freight, and the passage and transportation of troops, the Federal Government will, through the proper department of state, deliver to the Company or representative of the same, at the ports of embarkation the corresponding order, which once fulfilled will give it (the

Respondent's Exhibit B-1 (Continued)

Company) the right to collect when it pleases, either at the port of landing or at a place where it has established its general offices. Relative to the students of the Merchant Marine schools, and the lighthousekeepers and their families, the Department of the Navy will issue the proper orders. This same Department, in due time, will give the Company a list of the authorities or employees expressly authorized to issue this type of passage.

Thirteenth:—The agents of the Company will notify the public and the Post Offices of the hours of departure of the ships, with five hours advance notice, by means of bulletins affixed in a place where they may be seen by those using said offices.

Fourteenth: The Company will be obliged to install on each passenger ship a post box so that the passengers may deposit in it the complaints they may desire to register of the poor service or abuse by the employees of the Company, which (boxes) the Port Captains designated by the Department of the Navy will have authority to open as often as they deem necessary.

Fifteenth: The Company promises to keep the vessels in perfect navigable condition and cleanliness, and to render efficient service to the passengers they may carry. They also promise to render with the same efficiency all services concerning freight.

Sixteenth:—The Federal Government grants the following franchises to the vessels referred to in this contract:

Respondent's Exhibit B-1 (Continued)

I. They will be received and cleared immediately upon arrival, after visits of the Health and Immigration (authorities) at the first and last Mexican ports at which they touch on their trips to sea, and without such restrictions in the other (ports).

II. They will be permitted to work day and night in order that they may not interrupt their schedules as long as these operations comply with the respective regulations of the customs and labor laws.

III. They may unload and load at the same time, at any hour of day or night, including holidays and Sundays, with the exception of national holidays when they must observe the corresponding regulations of the Federal Labor Law.

IV. They may open registry (?) in any port of call with five days advance notice to the one (port) in which, according to their schedule, they are due to arrive.

V. They will be given preference in the matter of berths at the docks of the national ports at which they call in accordance with the corresponding regulations.

VI. They may transfer to other national vessels the freight which they carry after written notice to the fiscal authorities in compliance with the law.

VII. The merchandise which they may un-

Respondent's Exhibit B-1 (Continued)

load by error in some port will be subject to the established regulations of the Customs Law in force relative to cases of lost and found merchandise.

VIII. The said vessels will have the right to use, free of charge, the Dry Docks of Salina Cruz, in Oaxaca, twice a year per vessel.

IX. The initial repairs to these vessels, considering the poor condition for navigation in which they are found, will be made by the shops of the Dry Docks of Salina Cruz, which will furnish the necessary materials for such repairs on account of the Department of the Navy, while the Company will, in turn, pay the price of the labor.

Seventeenth: The Company will be permitted to keep in all ports of call of the vessels, which are the subject matter of this contract, lighters, tugs, muds/kows and other craft necessary for good service in the judgment of the Department of the Navy, thus enjoying all possible conveniences within the law, which are relative to the service which they perform.

Eighteenth: The vessels operated by the Company will have preferential rights of arrival at all national ports along the Pacific Coast.

Nineteenth: The Federal Government grants a subsidy of ~~\$1.00~~ One Peso per travelled mile for each of the vessels which are the subject matter of this contract. When the trip has been made in

Respondent's Exhibit B-1 (Continued)

transporting merchandise destined for the service of lighthouses, the subsidy will be \$1.50 One Peso Fifty Centavos per travelled mile. The amount of this subsidy per voyage will be paid in this capital after proof of the distance travelled has been established by presentation of a copy of the Daily Navigation Log, certified by the Port Captain of the last corresponding port on the trip referred to. Once the proof has been established, the Department of the Navy will issue the corresponding order to pay.

Twentieth: The Government will at all times have the right to inspect the vessels, which are the subject matter of this contract, through the Naval and Engine Inspectors of the Department of the Navy. This right which the Department of the Navy reserves to itself does not exclude the powers granted it by the proper articles of the Law of General Means of Communication.

Twenty-first: The Federal Government will exercise the most complete right of vigilance over all the affairs of the Company. The Company is under duty to produce, upon request of the proper department, the principal and auxiliary books of accounting of the business. This duty on the part of the Company extends equally to all classes of books, documents and vouchers of the business, complementing the bookkeeping of the same.

Twenty-second: The Company is under duty to keep a representative in Mexico City who is duly

Respondent's Exhibit B-1 (Continued)

authorized to deal with the Federal Government on all matters pertaining to this contract in the event that the Company does not establish its general offices in this city.

Twenty-third: The Company promises to employ only Mexican labor. The responsibilities arising from the relations of the Company with its workmen shall not affect in any case the goods which are the property of the Federal Government figuring in this contract.

Twenty-fourth: With regard to the interpretation, performance and other actions arising from the present contract, the contracting parties will expressly submit themselves to the jurisdiction of the courts of the city of Mexico, D. F., the Company thus renouncing the forum of its domicile.

Twenty-fifth: The Company declares that its nationality is Mexican, and that it is organized in accordance with the corresponding national laws. It is expressly stipulated that no foreign government will be admitted as a partner to this Company, nor any individual of such characteristic (foreign) without previous authorization by the Department of the Navy, and then only after said foreigner, before his admission, has sworn before the Department of Foreign Affairs that he wishes to be considered as Mexican with reference to any acts in the participation of this Company, expressly renouncing all rights and appeals granted to foreigners, and binding himself never to request

Respondent's Exhibit B-1 (Continued)

the protection of his Government, under penalty of losing to the Mexican Government all that he has acquired by virtue of this contract, or by his membership in the Company.

Twenty-sixth: The present contract will be terminated for any of the following reasons:

I. In case the public service, which is the object of this contract, is interrupted, partially or totally, without justifiable cause, without previous knowledge of the Department of the Navy, which will judge if the duration of the interruption warrants the rescission of the contract.

II. In the event of the alienation or transfer of this concession or of the rights thereunder, of the goods used in the service, which are subject-matter here, of the goods used to aid in this service, of the accessories mentioned in this contract, or of the franchises granted in the same. Any one of these acts will be void by law, without recourse to judicial decision, by virtue of the fact that the contracting parties have expressly accepted these terms on signing this present contract.

III. In the event of the rental or lease to a third person of all or part of these vessels, their auxiliary services, accessories or goods destined for the fulfillment of the contract. In this case, said acts will be equally void at law, having been expressly accepted by the contracting parties.

Respondent's Exhibit B-1 (Continued)

IV. In the event of the granting, mortgaging, alienation, or encumbrance of any kind, of this concession or of any of the rights obtained thereby, or of the goods destined for the said public service, or in case any acts of ownership not specified in the above-mentioned provisions are exercised by the Company. In the event of these infractions, any of the mentioned acts will be void at law, in the same terms expressed in the above clauses.

V. In the event of all other reasons specified in the Law of General Means of Communications, as well as in other laws which may be issued in the future on this subject.

VI. In case the insurance policies on these ships delivered to the Company against all risks are permitted to lapse, and which this Company is under duty to keep in force under Provision V of this present contract.

VII. In case the Company fails to perform any of the provisions of this contract.

Interruptions caused by time used for repair of the vessels are not included in the first section of this Provision.

The rescission will be declared administratively by the Federal Executive, through the Department of the Navy, after hearing what the Company has to say in its own defense, within 30 days following the date of the dec-

Respondent's Exhibit B-1 (Continued)

laration of termination of the contract, and after this time is up, the rescission of the contract will have legal effect, without appeal whatever, in the event the Department of the Navy does not judge as satisfactory the defense of the Company. In the event the Department of the Navy judges the defense in order, it will revoke the declared termination, continuing the contract in force in the same manner as before the declaration of termination. It is agreed that the causes mentioned in Sections II, III and IV of this Provision will automatically terminate this contract, without need of the above-mentioned procedure.

Twenty-seventh: Rescission will result as a consequence in not only the termination of the rights and duties contained in this contract, but also in the return of the vessels to the Federal Government which it delivered to the Company for operation, within a term of not more than 40 days, and a delivery to the said Government of the profits due them up to the date of the rescission of this contract, within a term of not more than 90 days, besides automatically causing the forfeiture of the bond mentioned in the Second Provision of this contract.

Twenty-eighth. The period for this contract to be in force is of five years with option to renew for five additional years if there is no notice in

Respondent's Exhibit B-1 (Continued)

contrary by any of the contracting parties, within six months of anticipation to each five year period.

Twenty-ninth: With reference to the payment of the 50%, fifty percent, of the distributable profits corresponding to the Government referred to in Provision III, on the 31st of December of each year, a general inventory will be made under official supervision, and the Company will pay to the Treasury of the Nation, within the first 10 days of the following February, the total amount of the 50%, fifty percent, of the net profits of the business due to the Federal Government.

TRANSITORY (PROVISIONS).

I. Until the schedules of the Company of their navigation routes have been approved, it is authorized to continue the ones now in force.

II. All legal regulations of public order now in force will form an integral part of this contract as far as they affect the subject matter of this contract.

III. In order that the Company may continue the service on each of the vessels referred to in this contract, the corresponding insurance policy covering the vessel in question should be in force.

IV. The operation and handling of the steamships transferred on August 27th last, remain subject to the terms and conditions of the provisions of this contract, the Company being responsible for the liabilities arising since that date.

Respondent's Exhibit B-1 (Continued)

V. The present contract will be effective upon the date of its publication in the Official Daily of the Federation.

Mexico, D. F., October 3, 1941

Secretary of the Treasury &
Public Credit

.....
Lic. Eduardo Suarez.

Secretary of the Navy

.....
Gral. De Division Heriberto
Jara.

(Last signature on p. 8 of photostat)

Compania Mexicana de Navega-
cion del Pacifico, S. de R. L.
General Manager.

.....
Gonzalo Abaunza.

Citizen Adolfo Ruiz Cortines, Chief Clerk of the Department of Interior, by order of the Citizen Secretary, Certifies that the Citizens General of the Division Heriberto Jara and Atty. Eduardo Suarez, are Secretary of the Navy and Secretary of the Treasury, respectively, and that the signatures are theirs which appear on the present contract. The stamps (required) by law are found affixed on the original of the present document.

Respondent's Exhibit B-1 (Continued)

Registered under No. 1268.

Assistant Chief of the Interior
Dept.

.....
Lic. Marco Antonio Munoz T.

The undersigned Chief Clerk of Foreign Relations certifies that Mr. Adolfo Ruiz Cortines was Chief Clerk of the Interior Department on the 22d day of December of 1941, and that it is his signature which appears above.

Mexico, D. F., twenty-third of December of one thousand nine hundred and forty-one.

[Endorsed]: Filed 1/29/42.

B-1 and B-2. If the court please, I might suggest in case of any discrepancy appearing, as noted in the briefs, as between these two translation, that, as the court did suggest at our conference, in that case the court would have a translation made. I do not anticipate that there will be any so far as we are concerned. I do not know how with the counsel for the libellant, but I suggested if there was any discrepancy it would be considered that the court might have the translation made from an independent source.

Mr. Henderson: That will be quite agreeable to libellant.

Mr. Jaffray: In that stipulation, as Exhibit C,

is the certificate of the United States as to the incumbency of the Ambassador whose name appears on that certificate, and that certificate has been already filed, and we offer that as Exhibit C if there is no objection.

Mr. Henderson: No objection.

RESPONDENT'S EXHIBIT C

United States of America

Department of State

To all to whom these presents shall come, Greeting:

I Certify That Senor Dr. Don Francisco Castillo Nájera, whose name is subscribed to the paper hereto annexed, is duly accredited to this Government as Ambassador Extraordinary and Plenipotentiary of Mexico.*

In testimony whereof, I, Cordell Hull, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Director of Personnel of the said Department, at the City of Washington, in the District of Columbia, this 23rd day of December, 1941.

(Seal)

CORDELL HULL

Secretary of State.

By EDWARD YARDLEY

Director of Personnel.

[Endorsed]: Filed 1/29/42.

[*For the contents of the annexed document the Department assumes no responsibility]

Mr. Jaffray: No objection. Exhibit D in the stipulation is the authorization from the Ambassador to Mr. Salazar to appear specially for the Republic of Mexico in this proceeding, and that is already on file and we offer that as Exhibit D.

Mr. Henderson: No objection.

RESPONDENT'S EXHIBIT D

Rodolfo Salazar, Consul of Mexico at Los Angeles, California, is hereby granted full authority to appear especially in the United States Court for the Southern District of California, Central Division, in *R. B. Hoffman vs. The Mexican Steamship Baja California et al* case Number 1961BH, and assert a claim of title of the Mexican Republic to the boat "Baja California", and to raise jurisdictional questions in the name of the Republic of Mexico, and to take any and all necessary steps to prove that the "Baja California" is owned by the Government of the Republic of Mexico.

Washington, D. C., December 23, 1941.

F. CASTILLO NAJERA

Francisco Castillo Nájera,

Ambassador of Mexico to the
United States of America.

[Endorsed]: Filed 1/29/42.

Mr. Jaffray: We have as Exhibit E in the stipulation [52] a provision for any documents calculated to prove title to the steamship in question, and we will offer several instruments that we have, one of which appears to be a letter from the Secretariat of the Navy of the Republic of Mexico. We have it named in the stipulation as Exhibit E, and I suggest that this letter from the Secretariat of the Navy be marked Exhibit F-1 and the translation accompanying it be marked Exhibit F-2.

We wish to expunge that offer from the record, at the suggestion of counsel for the libelant.

Mr. Henderson: We so stipulate.

Mr. Jaffray: And instead, ask to have this letter mentioned marked as Exhibit G, with the translation attached to it as G-1.

Mr. Henderson: If the court please, the document offered consists of a letter on the letterhead of the Secretariat of the Navy, in accordance with the translation of the document which is attached thereto. The translation shows the original as dated the 3rd day of November, 1941. We have suggested that this document be offered as Exhibit G, although no such exhibit is provided for in the stipulation. Our thought is that the document is effective as a navigation permit and not tending to show title, and that the Republic has many other documents which show title. However, we are quite agreeable to this going into evidence as Exhibit G, on the understanding that libelant shall

have [53] the privilege of filing with the court, with its brief, further copies of the laws of Mexico in accordance with paragraph B, subdivision (2), of the stipulation, and that when such copies of articles are so filed that they shall be deemed in evidence for all purposes in this proceeding. Our reason for that is that this document was just brought to our attention this morning and we would like to reserve that privilege. Is that agreeable to you, sir?

Mr. Jaffray: That is agreeable.

RESPONDENT'S EXHIBIT G-1

(Seal) Consulado

A letter head with the National Coat of Arms and the reading: Secretariat of the Navy.—

Angel A. Corzo Castillo, Commodore of the Navy and Chief Clerk of the Secretariat of the Navy, issues the present Permit of Navigation to the steamship "Baja California", property of the Federal Government and at the present time being administered by the Compania de Navegacion del Pacifico, S. de R. L. y C. V., until the Supreme Patent of Navigation is issued; therefore, requests the Civil, Naval and Military Authorities, national as well as foreigners not to obstruct its free navigation through the seas in which it may travel, neither its entrance, leaving or detention in the Ports where it may find itself, and allowing it to provide itself of whatever it may need.—Issued at the City of Mexico, Federal District, on the

third day of the month of November of the year nineteen hundred and forty one. (Signature).

[Endorsed]: Filed 1/29/42.

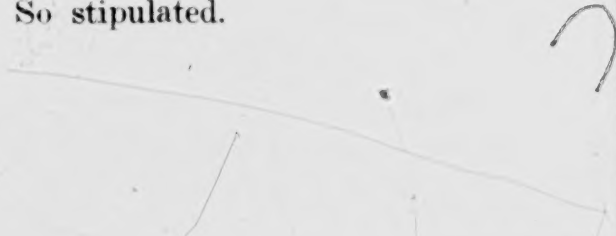
The Republic of Mexico then offers a communication which appears to be from the Under-Secretary of Marines of the Republic of Mexico, with its translation, as Exhibit H.

We wish to change the offer to have this communication marked Exhibit E-1, with the translation attached as E-2, and another communication which appears to be from the Director General of National Properties of the Republic of Mexico as Exhibit E-3, with its translation attached as Exhibit E-4.

Mr. Henderson: Would the clerk mark E-1 and E-2 for identification, please? Would the clerk also mark Exhibits E-3 and E-4 for identification?

May it be stipulated that the translation entitled Republic's Exhibit E-2, containing the words "Exempt from tax" refers to the purple stamped words on the certificate on Exhibit E-1, reading "Exento de Derechos"; that these [54] same words appear on Exhibit E-3, and that they imply the certificate is exempt from tax?

Mr. Jaffray: So stipulated.



RESPONDENT'S EXHIBIT E-2

Translation of the Original in Spanish.

(Seal) Consulado

Official Seal of the Executive Branch of the Federal Overnment.—Mexico, D. F.* Department of Marine.

Angel A. Corzo Castillo, Undersecretary of Marine, hereby Certifies: to wit, that in file No. 22/304.1/3703-3, of the general archives of this Department, in relation with the Steamship..... Baja California'', of National Register, there exist several records which justify the ownership by the Mexican Nation of the said ship which was acquired in the year 1938 (nineteen hundred thirty eight) by virtue of its purchase from Cia. "El Boleo", S. A. (The "El Bole Co."), having the following main characteristics: Gross Tonnage—Nine Hundred Sixty Two; Net Tonnage—Five Hundred Seventy Nine; Length at Perpendiculars Fifty Seven Meters; Breadth of Beam—Nine Meters Forty Five Centimeters; Depth of Hold—Six Meters Ten Centimeters; Classification—A-VI; Capacity for Seventeen Passengers; One Thousand One Hundred H.P., that is to say Horse Power; Two Scotch Boilers; Steel Hull; constructed in Nineteen Hundred Twelve in Nantes, France.—Which I hereby certify to be the true facts.—Mexico, D. F., the Sixteenth day of December Nineteen Hundred Forty One.—Signed,—Commodore Angel A. Corso Castillo.—Official Seal Department of Marine.—Official Seal of the Ex-

Executive Branch of the Mexican Government, Mexico, D. F. Department of the Interior.—Adolfo Ruiz Cortines, Undersecretary of the Interior (Gobernacion) acting by order of the Secretary, Certifies: that Commodore Angel A. Corzo Castillo, is Undersecretary of Marine and that the preceeding signature is his own.—Effective Suffrage. No Reelection.—Mexico, D. F. January 19th 1942.—Registered under No. 92.—For the Chief of the Department of Government. (Signed) Lic. Rafael Murillo Vidal.—Number 00185.—Exempt from Tax.—The undersigend Undersecretary of Foreign Affairs, Certifies: that Mr. Adolfo Ruiz Cortines, was Undersecretary of the Interior (Gobernacion) on the nineteenth day of January Nineteen Hundred Forty Two, and that the above signature is his own.—Mexico, D. F. the Nineteenth day of January Nineteen Hundred Forty Two.—Signed.—Ernesto Hidalgo.

The undersigned, Vice-Consul of Mexico, hereby Certifies: that the above is a true translation of the original documents from the Spanish language.

Los Angeles, California, January 27, 1942.

(Seal)

CARLOS GRIMM,

Carlos Grimm,

Vice-Consul of Mexico.

[Endorsed]: Filed 1/29/42.

RESPONDENT'S EXHIBIT NO. E-4
TRANSLATION FROM SPANISH TO
ENGLISH.

Official Seal of the Republic of Mexico, Executive Branch Secretariat of Treasury and Public Credit, Mexico City.

Ernesto R. Mendez, Director General of National Properties of the Secretariat of Treasury and Public Credit, Certifies: that in accordance with the data contained in the respective files, the National vessel "Baja California", is the property of the Federal Government.

This document is issued at the petition of the Secretariat of Marine.

Mexico, Federal District, January 17th of the year 1942. (Signature of Ernesto R. Mendez).

Official Seal of the Republic of Mexico, Executive Branch. Secretariat of the Interior Department of Government.

Adolfo Ruiz Cortines, Chief Executive Officer of the Secretariat of the Interior, by order of the Secretary, Certifies: that Ernesto R. Mendez is the Director General of National Properties of the Secretariat of Treasury and Public Credit, and that the foregoing signature is his own.

Effective Suffrage. No Reelection.
Mexico, D. F., January 19, 1942.

(Signature of Adolfo Ruiz Cortines).

Registered under No. 93.

The Chief of the Department of Government.

(Signature of Lic. Rafael Murillo Vidal.)

(On a Legally Attached Document) Fee Exempt.
Number 0184.

The under signed, Chief Executive Officer of the Secretariat of Foreign Relations Certifies: that Mr. Adolfo Ruiz Cortines, was Chief Executive Officer of the Secretariat of the Interior on the 19th of January of the year 1942, and that the foregoing signature is his own.

Mèxico, D. F. January 19, 1942.

(Signature of Ernesto Hidalgo.)

Officially attached appears a document signed by Kenneth A. Byrns, Vice-Consul of the United States of America, dated January 19, 1942, wherein he certifies that Ernesto Hidalgo, whose signature appears in the attached document was the Chief Clerk of the Ministry of Foreign Affairs, on January 19, 1942.

This document is executed in English and is self-explanatory.

[Endorsed]: Filed 1/29/42.

We further offer into evidence as Exhibit F in the stipulation group of documents with regard to the carrying of the mail and have them marked as Exhibit F.

Mr. Henderson: May it be stipulated that both parties shall have the privilege of taking photostatic copies of this exhibit and filing with the court, within five days, a translation of this Exhibit F?

Mr. Jaffray: So stipulated.

Mr. Henderson: For the purpose of making the photostat may it be stipulated that this exhibit may be withdrawn from the records of the court and returned to the court?

Mr. Jaffray: That will be satisfactory.

Before the stipulation was signed, with the idea of bringing the case forward, the Republic of Mexico filed the opening brief with the libellant and we now offer this as our opening brief in this case, perhaps with the understanding, which would be under the stipulation, that all matters that are brought out by the libellant's brief may be thoroughly discussed in our closing brief if we see fit, without being prevented by presenting this brief a little in advance of our stipulation, and of some of these exhibits that we have received. So this would be taken practically as a preliminary statement of the case, from the point of the Republic [55] of Mexico. I believe that you have a copy?

Mr. Henderson: Yes; we do. That will be agreeable to us.

Mr. Jaffray: The Republic of Mexico rests on its production of evidence under this stipulation.

Mr. Henderson: May the record show the Republic of Mexico has produced from the ship's records and delivered to us, and we now offer into evidence as Libelant's Exhibit 1, Inward Foreign Manifest, showing cargo destined for the Port of Los Angeles. May we number that 1-A?

The Clerk: 1-A?

Mr. Henderson: Yes.

LIBELANT'S EXHIBIT No. 1-A

Sheet No. 1.

Guy B. Barham Co.
Custom House Brokers
Los Angeles and San Pedro
California

INWARD FOREIGN MANIFEST

Report and Manifest of the cargo laden on board of the Mexican S.S. "Baja California" of Santa Rosalia, B. C. Mex, of the Cia. Mexicana De Navegacion Del Pacifico, S. De. R. L. Line whereof Martin Gavica Oropesa is Master, capacity of 543.— net tons. Built at De La Loire, State of Nantes, France, and owned as set forth in Register granted at.....on....., 193...., which cargo was taken on board at.....for port of Los Angeles, Cal. - Harbor.)

Bill of Lading Number	Marks	Numbers	Packages and Contents	By Whom Shipped	Consigned To and Address	Port of Destination	Custom Notations (Number and Kind of Entry)
Cargo from Manzanillo, Col. Mex.—Sailing November 28th. 1941.							
1	N/M	N/N	29 Bales Cotton Waste	Francisco Moreno	Juan Martinez, Los Angeles, Cal.	Los Angeles	
2	Villasenor Wrenco. Los Angeles	N/N	229 Bales Palm Fibre	Jesus Castro y Cia. Suchs.	Order Citizens National Trust & Savings Bank of Los Angeles	Cal.-Harbor. do.	
3	P.A.C.C.	N/N	6 Cases Tortoise Oil	Modesto Cuarera	Pan-American Commercial Co., Los Angeles, Cal.	do.	
Cargo from Mazatlan, Sin. Mex.—Sailing December 3rd. 1941.							
1	Pan-American Com- mercial Co., Los Angeles, Cal.	N/N	193 Cases Shark Livers	Adan Carreon Arvide	Pan-American Commercial Co. Los Angeles, Cal.	do.	
2	N/M	N/N	2,310 Sacks Copra Cake	Explotadora De Aceites— Vegetales, S. A.	Order. Notif. Western Consumers-Feed Co. Los Angeles, Cal.	do.	
Cargo from San Jose Del Cabo, B. C. Mex.—Sailing December 6th, 1941.							
1	G. C. Hnos. Shark Livers	N/N	92 Cases Shark Livers	Gonzales Casseco Hags	Pan American Commercial Co. Los Angeles, Cal.	do.	
	G. C. Hnos. Shark Fins	N/N	26 Bundles Shark Fins	do do do	do	do.	
	G. C. Hnos.	N/N	1 Carton Cheese	do do do	do	do.	
	N/M	N/N	500 Empty Drums	do do do	do	do.	
3,386 Packages in Total.							

On Board in Los Angeles, Cal. Harbor, December 14th, 1941.

[Illegible]

Martin Gavica, Oropesa.—Master

I certify that this manifest was this day produced to me as the.....manifest of the cargo on board the vessel named above from the port stated
Original and Duplicate
and whereof..... is master. If produced as copy of the manifest, I certify that I have examined and compared it with the original and find it to
agree therewith., 193..... Inspector of U. S. Customs.

[Endorsed]: Filed 1/29/42.

The same is true with respect to certain freight bills and bills of lading which we now offer into evidence as Libelant's Exhibit 1-B.

The same is true of the Inward Foreign Manifest, excepting that it refers to cargo destined for San Francisco, California, and we now offer that Inward Foreign Manifest into evidence as Libelant's Exhibit 1-C.

LIBELANT'S EXHIBIT No. 1-C

INWARD FOREIGN MANIFEST

Report and Manifest of the Cargo Laden on board of the Mexican S.S. "Baja California" of Santa Rosalia, B. C., Mex., whereof Martin Gavica Oropesa is Master of 543.— tons burden, built at De La Loere Nantes France. [in the State of....., and owned by..... of....., as per register granted at....., theday of....., 192], and bound for San Francisco, Cal., which cargo was taken on board at*.....

(†Portion in brackets to be filled in only in case the vessel is under American Register.)

(*If the lading be at more than one port, state in the body of the Manifest the name of each port, the cargo laden thereat, and the date of sailing therefrom.)

										Leave this Column blank. It is for use of Customs Officers only
No. of B/L	Marks on Packages	Nos. on Packages	No. of Packages	Kind of Packages	Description of Contents	By Whom Shipped	To Whom Consigned or if to Order	Consignee's Residence	Port of Destination	
Cargo From Manzanillo, Col. Mex.—Sailing November 28th, 1941.										
1	Consulado De Mexico	N/N	1	Case	Uniform Clothes	Francisco Moreno	Consulado De Mexico	San Francisco, Cal.	San Francisco, Cal.	
2	D.F.T.	1/8	8	Sacks	Dried Flies	Gutierrez Y Domínguez S.de.R.L.	Order of Shippers Notify. Domestic & Forcing Trade Co.	do	do	
3	C. P.	N/N	47	Cans	Fish Livers	Beneficiadora Industrial S.de R. L.	Technical Fisheries Co.	do Evans Avenue	do	
Cargo From Mazatlan, Sin. Mex.—Sailing December 3rd, 1941.										
1	J. R. O.	N/N	10	Bales	Shark Fins	J. Ramon Oropesa	Quong Sang Chong & Co.	San Francisco, Cal.	do	
Cargo From San Jose Del Cabo, B. C. Mex.—Sailing December 6th, 1941.										
1	J. D.	N/N	14	Sacks	Shark Fins	J. Palacios M.	Order of Shipper Notify. Security First National Bank.	San Francisco, Cal.	do	

80 Packages in Total.

INWARD FOREIGN MANIFEST

CAT. No. 1372

Nationality—Mexican

No. of Crew—36.

MASTER'S OATH ON ENTERING
FOREIGN VESSEL.

I, Martin Gavica Oropesa, do solemnly, sincerely, and truly swear that the Report and Manifest subscribed in my name, and now delivered by me to the Collector of the Port of San Francisco, contains to the best of my knowledge and belief, a just and true account of all the goods, wares, and merchandise, including packages of every kind and nature whatsoever, which were on board the Mexican S. S. "Baja California" at the time of sailing from the Port of or which have been laden or taken on board at any time since, and that the packages of the said goods are as particularly described as in the Bills of Lading, signed for the same by me or with my knowledge; that I am at present, and have been during the voyage, master of the said vessel; that no package whatsoever, or any goods, wares, or merchandise have been unladen, landed, taken out, or in any manner whatever removed from on board the said vessel since her departure from the said Port, except such as are now particularly specified and declared in the abstract or account herewith, and that the clearance and other papers now delivered by me to the Collector are all that I now have, or have had, that

any way relate to the cargo of the said vessel. And I do further swear that the several articles specified in the said Manifest as sea-stores for the cabin and vessel are truly such, and were bona fide put on board the said vessel for the use of the officers, crew, and passengers thereof, and have none of them been brought, and are not intended by way of merchandise, or for sale, or for any other purpose than above mentioned, and are intended to remain on board for the consumption of said officers and crew. And I further swear that if I shall hereafter discover or know of any other or greater quantity of goods, wares, and merchandise, of any nature or kind whatsoever, than are contained in the Report and Manifest subscribed and now delivered by me I will immediately, and without delay, make due report thereof to the Collector of the Port of San Francisco. And I do likewise swear that all matters whatsoever in the said Report and Manifest expressed are, to the best of my knowledge and belief, just and true.

I do further, as required by law, solemnly swear that I have, to the best of my knowledge and belief, delivered, or caused to be delivered, into the Post Office at or nearest this Port, every letter and every bag, parcel, or package of letters that were on board the said vessel during her last voyage, and that I have so delivered, or caused to be delivered, all such letters, bags parcels, and packages as were in my possession or under my power or control.

* I further swear that no Officer of the Customs has applied for an inspection of the Manifest of

the cargo on board the said vessel, and that no certificate or indorsement has been delivered to me on any Manifest of such Cargo.

** And I further swear that before entering, or filing Manifest of said vessel at the Custom House, I mailed to the Auditor for the Treasury Department, Washington, D. C. a true copy of this Manifest.

I further swear that said vessel sailed from the said Port of + on the day of 192..., and arrived at this port, on the 14th. day of December, 1941.

[Illegible]

MARTIN GAVICA OROPESA

Master.

Port of San Francisco.

Sworn, before me, this day of 192....

.....

Deputy Collector of Customs

*This clause to be stricken out if the vessel has been boarded on arrival by a Custom officer.

**This clause to be stricken out if the vessel enters at a port where there is a Naval Officer of Customs, but the copy must be delivered to such officer at the time of entry at the Custom-House. (San Francisco is the only port on the Pacific Coast having such a Customs officer.)

† If the vessel has touched at any intermediate port or ports on the inward voyage, there must be

stated on the face of the Manifest the name of each port, the date of sailing therefrom, and the merchandise, if any, laden at each port. In such cases, insert: "Ports and dates of sailings noted on face of Manifest."

[Endorsed]: Filed 1/29/42.

The same is true of the freight bills and bills of lading, excepting that they refer to cargo destined for San Francisco, which we now offer into evidence as Libelant's Exhibit 1-D.

We understand that the Republic of Mexico has not been able within the time available to procure copies of manifests other than those heretofore offered into evidence, "other [56] manifests" meaning manifests showing cargo carried by the Baja California on and after October 3, 1941. In view of this situation, may it be understood between proctors for the Republic of Mexico and ourselves that they will endeavor to procure other manifests and submit them to us before the decision of this matter, and in the event the same are submitted to us we shall have an opportunity to offer the same into evidence herein?

Mr. Jaffray: That is agreeable.

Mr. Henderson: May it also be stipulated that at this time proctors for the Republic of Mexico admit in open court that the Baja California was at the time of the collision involved in the libel herein carrying for hire cargo not owned by the

Mexican Government, consigned by private parties in the United States to private parties in Mazatlan and elsewhere in Mexico?

Mr. Van Tress: We so stipulate.

Mr. Jaffray: That is agreed.

Mr. Henderson: And it is so admitted, I take it?

Mr. Jaffray: We so admit it.

Mr. Henderson: We offer into evidence as the Libelant's Exhibit 2 certain Articles of the Law of General Lines of Communication, as mentioned in paragraph B (2) of the stipulation we are proceeding under. Copy of this has been furnished proctors for the Republic of Mexico.

Mr. Jaffray: No objection. [57]

LIBELANT'S EXHIBIT No. 2
LAW OF GENERAL LINES OF
COMMUNICATION

(Translation from "Diario Oficial" of
February 19, 1940.)

(Embodying amendment published in "Diario
Oficial" of April 27, 1940.)

Lazaro Cardenas, Constitutional President of the
Mexican United States, to its inhabitants, KNOW
YE:

That Congress of the Union has seen fit to address
to me the following

Libelant's Exhibit No. 2—(Continued)

DECREE

Congress of the Mexican United States decrees:

LAW OF GENERAL LINES OF
COMMUNICATION

BOOK ONE

General Provisions.

CHAPTER 1

Classification.

Article 1.—General lines of communication are:

I.—Territorial seas, to the extent and within the terms established by the laws and International Law.

II.—Navigable and floatable rivers and their navigable tributaries, provided they come under any of the following cases:

a).—Whenever they flow into the sea or into the lakes, lagoons and estuaries mentioned in the following Section.

b).—Whenever, in their entire length or in part thereof, they serve as boundary of the national territory or between two or more States.

c).—Whenever they pass from one State to another.

d).—Whenever they cross the boundary line with another country.

III.—Lakes, lagoons and estuaries, which are floatable or navigable, provided they fulfill any of the following requisites:

a).—Whenever they communicate uninterruptedly or intermittently with the sea.

Libelant's Exhibit No. 2—(Continued)

b).—Whenever they are connected with rivers having a constant flow of water.

c).—Whenever the whole of the lake, lagoon or estuary, or a part thereof, serves as the boundary line of the national territory or as a boundary between two or more States.

d).—Whenever they pass from one State to another.

e).—Whenever they cross the boundary with another country:

IV.—Canals now used for navigation, or to be destined to such purpose in the future, whenever they come under any of the cases provided for in Sections II and III.

V.—Railways:

a).—Which connect two or more State with one another.

b).—Whose total length or part thereof, is situated within the 100-kilometer-wide frontier zone or the 50-kilometer-wide belt along the coasts, with the exception of urban lines which do not cross the boundary line with any other country and do not operate outside the limit of towns.

c).—Which interconnect with, or join any of the railways enumerated in this Section, provided they furnish a public service, with the exception of urban lines which do not cross the boundary line of any other country.

d).—Which are built entirely or in their greater part by the Federal Government.

e).—The private railways which are auxiliaries of

Libelant's Exhibit No. 2—(Continued)
an industrial business and which furnish public service

VI.—Highways:

a).—Which connect with some line in a foreign country.

b).—Which connect two or more States with one another.

c).—Which are constructed entirely or in their greater part by the Federal Government.

VII.—Bridges:

a).—Which have already been built, or may in the future be built, over international boundary lines.

b).—Which have already been built, or may in the future be built, on the general lines of communication.

c).—The building of bridges shall be subject to a prior permit of the Secretariat of National Defense, granted through the Secretariat of Communications & Public Works.

VIII.—The air space in which aircraft travel.

IX.—The telephone lines already installed or installed in the future within the belt one hundred kilometers wide along the frontiers or the belt fifty kilometers wide along the coast lines, as well as those located within the limits of a State, provided they connect with the systems in another State or with the general lines built under Federal concession or those of foreign countries, or when they are auxiliaries of industrial, agricultural, mining, commercial or other enterprises which operate under a permit, contract or concession of the Federal Government.

X.—Electric conductor lines and the environment

Libelant's Exhibit No. 2—(Continued)

into which electro-magnetic waves are sent, when same are used for communication by means of signs, signals, writings, images or sounds of any nature whatsoever.

XI.—Postal routes.

Article 2.—The following are integral parts of the general lines of communication :

I.—The auxiliary services, works, buildings and other dependencies and adjuncts of same ; and

II.—The lands and waters required for the right of way and for the establishment of the services and works referred to in the preceding Section. The superficial area of the lands and the extent and volume of the waters shall be fixed by the Secretariat of Communications.

CHAPTER II

Jurisdiction

Article 3.—The general lines of communication and the means of transport which operate thereon shall be exclusively subject to the Federal Government. The executive shall exercise its powers through the Secretariat of Communication & Public Works, in the following matters ; and without prejudice to the provisions of the Law of Secretariats of State and autonomous Departments :

I.—Construction, improvement, maintenance and operation of the general lines of communication.

II.—Inspection and vigilance.

III.—Granting and interpretation of, and compliance, with concessions.

Libelant's Exhibit No. 2—(Continued)

IV.—Making of contracts with the Federal Government.

V.—Forfeiture, reversion and modification of concessions and contracts entered into with the Federal Government.

VI.—Granting and annulment of permits.

VII.—Expropriation.

VIII.—Approval, revision and modification of tariffs, circulars, time-tables, tables of distances, classifications, and, in general, all documents connected with the operations.

IX.—Registration.

X.—Sale of the general lines of communication and means of transport, as also all questions affecting their ownership.

XI.—Vigilance over the rights of the Nation, as regards the juridical situation of the property subject to reversion, in the manner laid down in this Law or in the respective concessions.

XII.—Violations of this Law and its Regulations.

XIII.—All questions of an administrative nature connected with the general lines of communication and means of transport.

In the cases specified in Sections IV and V, the approval of the Secretariat of Finance & Public Credit must be previously obtained, provided that the acts performed in the exercise of such powers involve the disbursing of public funds, compromise public credit or affect Federal property or property under the care of the Government.

Libelant's Exhibit No. 2—(Continued)

CHAPTER III

Concessions, permits and contracts.

Article 8.—A concession or permit of the Federal Executive, issued through the Secretariat of Communications and subject to the precepts of this Law and its Regulations, shall be required to build, establish or operate general lines of communication.

The construction, establishment or operation of general lines of communication shall conform to a general plan that will meet national economic needs and which must be made known to the public. The Secretariat of Communications shall therefore publish the program of the respective works during the first fifteen days of January of each year, and it must fulfill the following general conditions.

I.—Preferential communication between the zones of greatest potential economic value, which lack rapid means of transportation

II.—Based on the preceding Section, special attention will be given to the establishment of lines which connect with or feed the trunk lines.

III.—The construction or establishment of new lines shall be subject to prior economic studies with a view to determining:

a).—The proper distance for the new line, as compared with existing lines, to avoid duplications within the same zone whenever such existing lines satisfactorily meet the transportation requirements of the region.

b).—Prospects for initial traffic.

Libelant's Exhibit No. 2—(Continued)

- c).—Natural wealth which could be utilized.
- d).—Planning of the operations which the study of the preceding sub-clause would give rise to.
- e).—Colonization possibilities.
- f).—The state of the territorial property which would be benefited by the new line of communication.
- g).—The Secretariat of National Defense shall act as advisor of the Secretariat of Communications from a military point of view, in the cases mentioned in Sub-clause a) of Section III.

IV.—The Federal Government shall opportunely carry out the necessary colonization work along the zones influenced by the new lines and at the most appropriate places, expropriating the required areas of land.

In order that the purposes sought by this Article may be duly carried out, a Technical Advisory Commission shall be formed, composed of such official representatives of the workers and representatives of the companies as may (*be*) specified in the respective regulations to be issued.

This Commission shall also be entrusted with the drawing up of a study to determine the number of vehicles which should render service on each route, so that it will not be greater than required by its capacity nor less than that required for the general interests.

Article 12.—Concessions for the construction, establishment or operation of general lines of communication may only be granted to Mexican citizens or to companies (2) formed under the laws of Mex-

Libelant's Exhibit No. 2—(Continued)

ico. In the case of companies, their charter must contain a stipulation to the effect that, if one or more foreigners are or become shareholders thereof, they must consider themselves as Mexican citizens in so far as the concession is concerned, and that they bind themselves not to invoke the protection of their Governments in regard thereto, under penalty, if they should do so, of losing all the property they had acquired to build, establish or operate the line of communication, as well as the other rights granted them by the concession, same reverting to the Nation.

Article 13.—The individuals or companies to whom a concession or permit is granted for the construction or operation of general lines of communications shall themselves undertake such construction or operation, and under no circumstances may they organize companies to whom they transfer the rights acquired under the concession or permit.

Nevertheless, the Secretariat of Communications may authorize the cession of the rights and obligations stipulated in the concession or permit whenever, in its opinion, this is advisable, provided such concession or permit has been in force for not less than five years and that the beneficiary has fulfilled all his obligations.

Article 20.—Concessions shall specify the bases on which companies operating general lines of communication shall fix their tariffs for services rendered to the public. Subject to such bases, the Secretariat of Communications may modify the tariffs

Libelant's Exhibit No. 2—(Continued)

whenever the interests of the public so require, but previously hearing the views of the concerns affected and provided, always, that the profitableness of the operations would not be endangered thereby.

CHAPTER IV

Expropriation rights, use of national property
and other franchises.

Article 27.—The persons or companies which construct, install or operate general lines of communication may utilize, in the building, maintenance and improvement of the lines, auxiliary services, dependencies and adjuncts, lands belonging to the Federal Government and materials and waters thereon and in rivers of Federal jurisdiction, subject to the definite resolutions of the Secretariats of Finance and of Agriculture, respectively, based on relative laws and rulings. These Secretariats, in agreement with the Secretariat of Communications, may grant an exemption or reduction of the amounts payable, according to the tariffs, for the use of national lands.

Article 28.—The Federal Government may give financial assistance to the concessionnaires of general lines of communication and means of transport. Such aid shall be granted in accordance with the provisions of the Organic Law of the Budget or other special laws and after hearing the viewpoint of the interested parties and possible parties affected, and only when the Secretariat of Communications, after studying the case, and by a resolution of the Presi-

Libelant's Exhibit No. 2—(Continued)

dent of the Republic, declares the establishment of the line to be urgent and calling for stimulation.

CHAPTER V

Forfeiture and rescission of concessions and contracts and revoking of permits.

Article 29.—Concessions shall be forfeited for any of the following reasons:

I.—For failure to submit the plans covering the survey and localization of the lines, airports, emergency landing fields, stations, workshops and other works and installations within the time-limit stipulated in the concessions.

II.—For failure to build or install, within the time-limits stipulated in the concessions, the part or whole of the line or works agreed on.

III.—For interruption of the whole or the important part of the public service without justified cause, in the opinion of the Secretariat of Communications, or without its prior authorization.

IV.—For alienating the concession or any of the rights thereby granted, or the properties devoted to the service in question, without the previous approval of the Secretariat of communications.

V.—For transferring, mortgaging, alienating or in any other manner seriously encumbering the concession or any other rights thereby granted, or the properties devoted to the service in question to any foreign Government or State, or for admitting such as a shareholder in the concern-concessionnaire.

VI.—For placing in the hands of the enemy, in

Libelant's Exhibit No. 2—(Continued)

case of international war, any of the elements at the disposal of the concessionnaire in virtue of his concession.

VII.—Because the concessionnaire changes his Mexican nationality.

VIII.—For modifying or altering substantially the nature of or conditions under which the service, survey or route of the line or circuits of the installations are operated, or their location, without the prior approval of the Secretariat of Communications.

IX.—For failure on the part of the concessionnaire to pay, when so stipulated in the concessions, the participation due to the Federal Government, or for in any way defrauding the Exchequer of this participation, without prejudice to the respective penal liability.

X.—For failure to comply, in the respective case, with the provisions of Articles 102 and 103 of this Law.

XI.—For failure on the part of the concessionnaire to comply with his obligation to carry the various classes of correspondence.

XII.—For failure to furnish the bond or make the deposit referred to in Article 17.

XIII.—For the reasons governing forfeiture stipulated in the respective concessions.

Article 35.—The administrative contracts which the Federal Government enters into in connection with general lines of communication, their auxiliary

Libelant's Exhibit No. 2—(Continued)

services, dependencies and adjuncts shall be subject to rescission by administrative process based on the grounds therein set forth, but the procedure for their forfeiture shall be subject to the provisions of the preceding Article.

CHAPTER VII.

Operation of general lines of communication.

Article 57.—The companies shall be obliged to apply the tariffs without variations of any kind. The following are, therefore, prohibited:

I.—All acts or contracts whereby one or more persons are, directly or indirectly, allowed to pay a fare or freight charge which is less than that authorized in the tariff, or are given conditions other than those specified therein.

II.—The refund of the whole or a part of the fare or freight charge paid, when such return tends to reduce or rebate tariff rates, even though not made directly to the parties concerned, but to persons who may be considered as intermediaries such as agents, commission agents, etc.

III.—Passes or free transportation or franchises, except in the following cases and subject to the regulations issued in regard thereto:

a).—Those which are given to Federal or State officials and employees whose duties are connected with the service of the company which issues them, or if, in its opinion, it deems it necessary to grant them to other public officials and employees.

Libelant's Exhibit No. 2—(Continued)

b).—Those which are given to employees and their families and to the syndicate and trade organizations, whether of the company which issues the pass or grants free transportation, or of other national or foreign transport companies.

c).—Those given to persons who travel to take care of animals or merchandise transported, whenever the respective tariffs so stipulate.

d).—Those which are granted as an act of reciprocity.

All agreements made by the companies for the issue of passes must be submitted previously to the Secretariat for approval. The companies are also bound, in all cases, to render a monthly report regarding the number of passes issued.

Article 58.—The following are excepted from the provisions of Sections II and IV of Article 55 and Section I of Article 57:

I.—Contracts entered into between the Federal Government and the companies, in the interests of society or for a public service.

II.—Reductions made by the companies for purposes of charity or to students, teachers, repatriates, colonists, tourists, children, theatrical companies, athletic teams, travelling salesmen and commission agents, representatives of syndicates or of workers' cooperatives who travel in the performance of their duties, and, in general, workers earning low wages.

In all cases the persons who desire to avail themselves of this privilege must furnish proof of their status and the legitimate basis for their request, in

Libelant's Exhibit No. 2—(Continued)

the manner laid down in the respective Regulations or in the same special tariffs.

Any abuse of the right to this franchise shall disqualify the company or person liable therefor, for the period of one year, from again enjoying it.

III.—Temporary rates for passengers making pleasure trips.

IV.—Reduced rates when it is a case of a certain distance which the passenger may travel in either direction during a specified period of time or with a commutation ticket.

V.—The transportation at reduced rates of articles of prime necessity to places where same are urgently required due to: a public disaster, the high price of such articles on account of commercial speculations, or for other reasons of general interest which so merit, in the opinion of the Secretariat of National Economy.

VI.—The transportation of merchandise and people to poor or sparsely populated regions but which, in the opinion of the Federal Executive, could become centers of production and of employment.

VII.—Rates for special services, such as loading and unloading, transshipment, storage, cleaning, delays, haulage, rental of cars, parlor, sleeping and dining coaches, excess baggage, transportation of inflammable and explosive materials, and for such other effects and materials which, due to their nature, cannot be calculated by weight or measure and must pay rates other than those specified in the general tariff, such as the transport of corpses, etc.

Libelant's Exhibit No. 2—(Continued)

VIII.—Reduced rates based on percentages of the general tariff for the transportation of merchandise intended for export, frontier consumption or incoming or outgoing coastal traffic, but exclusively in the exceptional cases authorized by the Secretariat of Communications.

The special rates referred to in this Article may be cancelled by a ruling of the Secretariat of Communications or by its authorization whenever it deems advisable.

CHAPTER VIII.

Legal capacity and properties of companies enjoying concessions.

Article 86.—The charters of companies operating general lines of communications, their by-laws, and the rules governing their relations with the public must be submitted for approval to the Secretariat of Communications. Without this requisite they will have no legal effect whatsoever, in so far as the operation of the line is concerned.

Article 98.—Concessionnaires must establish their domicile in the place within the Republic stipulated in the concession, regardless of the agencies which it may suit their interests to establish in different parts of the country or abroad; and they must at all times maintain in the Capital of the Republic one or more attorneys-in-fact, with sufficient instructions and holding the necessary funds, to deal with the Federal Government.

Companies whose capital is small may be exoner-

Libelant's Exhibit No. 2—(Continued)

ated by the Secretariat from having said attorney-in-fact holding funds.

CHAPTER IX.

Rights of the Nation

Article 102.—The Federal Government, shall be entitled to a reduction of 50% on the rates for services of every nature which companies operating general lines of communication and auxiliary and connected services are authorized to charge the public, provided the following requisites are fulfilled:

I.—The service is an official one of the Federal Government.

II.—Said service is ordered for the Federal Executive, by any Secretariat or Department of State, by the head of the Presidential Staff or Private Secretary of the President of the Republic, or for the other Branches of the Government, through the channels that they may designate.

III.—That the payment be made by the Federal Offices and charged to the respective item of the Budget of Expenditure. The bases for applying the reduction for military service in peace times shall be laid down in Special Regulations.

The Secretariat of Communications is empowered to decide, in doubtful cases, as to the official nature of the service in question, but no mercantile service can be considered official.

Article 104.—General lines of communication and means of transport, with the exception of airways, are obliged to carry first to fourth class mail free of

Libelant's Exhibit No. 2—(Continued)

charge, as laid down in Chapter II of Book Six of this Law.

The rates for fifth-class mail for points connected by rail must be the same as express charges and the Federal Government will pay the transportation companies 50% of the express rates, but postal parcels will be carried free of charge between points that are not connected by rail. Whenever postal parcels are carried by more than one railroad, the 50% shall be divided proportionately, between all the lines over which they are transported.

Article 110.—The Federal Government shall have the right to receive a participation in the revenue obtained by the companies operating general lines of communication and means of transport for the operation of the services allowed by their concession. This participation shall be specified in the concessions or permits.

Article 118.—The privilege of riding free of charge in the vehicles of companies operating general lines of communication and means of transport shall be subject to the following rules:

I.—All concessionnaires are bound to give transportation in their vehicles to the properly accredited inspectors of general lines of communications of the Secretariat of Communications, even when the journey is made on lines other than those on which they exercise their duties. This privilege shall also be enjoyed by Postal and Telegraph Inspectors and workers on duty, as well as directors of construction of the railway, telephone and telegraph lines and of

Libelant's Exhibit No. 2—(Continued)

maritime works being carried out by the Federal Government. Their credentials must in all cases be signed by the Secretariat of Communications & Public Works or by the official expressly authorized thereby to do so.

The privileges referred to in this Article do not include that of travelling in the sleeping cars of the railways companies. In the case of aviation companies, the obligation shall be limited to the carrying of a maximum of five inspectors per month by the company, and subject to advices from the Secretariat of Communications. The railway inspectors referred to in Article 131 shall be entitled to berths and seats in the sleeping cars of the railway lines.

II.—The companies operating tramways or omnibuses under a Federal concession are bound to allow messengers, postmen and members of the Federal and Federal District police force on duty to travel free of charge in their vehicles, in accordance with the regulating provisions. Companies operating electric communication lines, including the National System, are bound to grant free service to the inspectors of the general lines of communication on matters of the service, with the right of using a code, but subject to the limitations set forth in the Regulations.

Article 120.—Companies operating general lines of communication must present yearly to the Secretariat of Communications a report containing, with reference to the preceding twelve months, such technical, administrative and statistical data, relating to

Libelant's Exhibit No. 2—(Continued)

said companies, as will demonstrate the manner said lines are operated in relation to the interests of the public and of the Government; and they must also furnish, whenever so called upon to do, any further data required by said Secretariat.

The accounting data shall be furnished at the intervals specified in the respective Regulations, without prejudice to the powers granted to the Secretariat by the foregoing paragraph.

Article 121.—Companies operating general lines of communication are also bound to furnish to the duly accredited inspectors of the Secretariat of Communications & Public Works all the information or particulars necessary for them to comply with their duties; to show them plans, files, studies, timetables, minute books, books of accounts, auxiliary books and all the documents referring to the material, economic and financial situation of such companies, without limitations or restrictions of any kind, and to allow them to have access to their offices, warehouses, storehouses, workshops and other dependencies. All the data which inspectors obtain shall be considered as strictly confidential, and shall only be made known to the Secretariat of Communications.

BOOK THREE

Communications by water

CHAPTER 1.

Regarding the Maritime Authorities

Article 183.—Land within the Federal zone may

Libelant's Exhibit No. 2—(Continued)

only be occupied free of charge in the following cases:

I.—For the establishment of warehouses, dry-docks, shipyards, fish packing plants and, in general, any works devoted to the building or repair of vessels.

II.—For the establishment of coast-guard stations, maritime signals, schools, hospitals and, in general, all works considered by the law as of public utility, or for public services allied to maritime communications.

III.—For the construction of general lines of communication, drainage, and ornamental works, at the discretion of the Secretariat of Communications.

IV.—Provisional occupations for launching vessels, spreading nets and drying fish, and other temporary occupations which are not speculative.

V.—For agricultural purposes carried out by the owners, lessees or parties receiving the usufruct of adjoining lands, provided they are peasants with small financial resources.

Occupations of the Federal zone for the purposes mentioned in this Article shall not be subject to inspection rates.

CHAPTER III.

Regarding Navigation

Article 199.—Mexican vessels engaged in foreign traffic involving stops at several ports shall comply with quarantine and migration requisites only at the first Mexican port at which they put in and at the

Libelant's Exhibit No. 2—(Continued)

last Mexican port from which they sail, as well as in the cases mentioned in the preceding Article.

Article 200.—In exceptional cases and whenever public interests so demand, the Secretariat of Communications is empowered to fix the route and to limit the number and tonnage of ships which should handle a specific traffic, taking into account the efficiency and safety of the vessels and the guarantees they offer for the passengers and cargo carried, whenever, in its opinion, the needs of the service are met. The Regulations shall specify the conditions to be fulfilled by vessels so that they may engage in the navigation and traffic referred to in Articles 200 and 201 of this Law. Yachts, training ships and other special ships not engaged in trade, shall be governed by regulating provisions, as regards navigation. Vessels engaged in interior navigation shall be governed by the respective Regulations in everything relating thereto.

Companies having vessels engaged in interior navigation for their own private service, whether allied with maritime navigation or not, are bound to transport similar products to their own, using up to 20% of their total capacity for such purpose. This service shall be furnished in accordance with the rules and rates fixed by the Secretariat of Communications.

CHAPTER VIII.

Inspection of Vessels.

Article 231.—The following are subject to inspection:

Libelant's Exhibit No. 2—(Continued)

I.—Vessels of Mexican nationality; and

II.—Foreign vessels which come under any of the following cases;

a.)—When chartered by persons of Mexican nationality to run between Mexican and foreign ports.

b.)—When they take on passengers or cargo in a Mexican port.

c.)—When they seek to obtain a permit from the Secretariat of Communications to engage in traffic which is reserved to Mexican ships.

III.—Shipyards, dry-docks and dockyards in the service of the merchant marine;

IV.—Wharves, warehouses, cranes, buoys and, in general, all establishments and adjuncts of the merchant marine service.

CHAPTER XII.

Contracts and Subsidies

Article 273.—The Secretariat of Communications may, when the public interests so demand and there being no Mexican Company, enter into contracts with foreign navigation companies for the establishment of public passenger and cargo services between Mexican and foreign ports.

The contracts referred to in the foregoing paragraphs shall grant subsidies, in addition to the special privileges which the Secretariat may grant to the companies in compensation for services rendered to the Federal Government and to the public, but in no case shall the subsidies exceed 25% of those granted to Mexican companies.

Libelant's Exhibit No. 2—(Continued)

The Federal Government may also grant subsidies to Mexican navigation companies whenever, in its opinion, they render services which are of special interest to itself or to the public.

Article 274.—In addition to the special franchises which the Secretariat grants to companies whose tugs render firefighting or salvage services, it shall subsidize them for same in the manner it deems necessary.

Martime navigation companies, in the case of the transportation at a reduced price mentioned in Article 102 of this Law, are bound to accept up to 10% of the total capacity of the vessel if they receive subsidies from the Federal Government, and up to 5% if they are not subsidized thereby.

CHAPTER XIV.

Personnel of the Merchant Marine

Article 285.—The personnel of the National Merchant Marine, the members of the Port Police and port pilots shall be considered as reserves of the Mexican Navy and shall be subject to the provisions of military law in accordance with the following bases:

I.—Members of the Port Police and port pilots: whenever the Executive of the Union so orders.

II.—Personnel of the Merchant Marine: only in case of international war.

Article 286.—The personnel of the National Merchant Marine shall include naval engineers, captains for foreign traffic, marine captains, first mates, second and third mates, coast patrols, boatswains, helmsmen, sailors, technical dredgers, practical dredgers,

Libelant's Exhibit No. 2—(Continued)

chief engineers, first, second and third engineers, assistant engineers, practical engineers, motormen, assistant motormen, oilers, stokers, fishing masters, fishermen, rivermasters, sailing masters, motor masters, moorsmen, cooks, cabin boys, stewards, radio men, pursers, supercargos, and in general, all of the regular personnel of the vessel. The personnel which renders services on board vessels must not be suffering from contagious diseases or physical defects which incapacitate them.

The certificates of captains and pilots of the national merchant marine as well as all commanders or officers of the Navy from the rank of "tenientes de corbeta" (literally "corvette lieutenants") entitle their holders to act as experts and to render reports in cases of maritime accidents and lawsuits in connection therewith, and also for the works specified in the Regulations of this Chapter.

The plans drawn up by the officers referred to in the preceding paragraph shall have validity in lawsuits; likewise for topographical surveys and appraisals made by them on properties of the Federal Government or of private individuals.

The certificates of first, second and third engineer entitle their holders to act as experts and to make reports in connection with mechanical and electrical matters.

The Regulations shall specify the commands and posts which may be held by the personnel of the national merchant marine, the tonnage and horse-power of the engines, and the requisites which must be ful-

Libelant's Exhibit No. 2—(Continued)

filled to obtain the various titles, certificates or appointments referred to in this Article.

All the personnel of the National Merchant Marine must be Mexican by birth.

BOOK SEVEN

Penalties

SOLE CHAPTER

Article 523.—Whosoever constructs or operates general lines of communication without a concession or permit of the Secretariat of Communications & Public Works shall lose the works carried out, the installations established and all movable and immovable property used in the operations, all of which shall revert to the Nation, and shall pay, in addition, a fine of from 50 to 5,000 pesos, at the discretion of said Secretariat. The same penalty shall be levied on parties who occupy the Federal zone and the banks of navigable ways without the authorization of the Secretariat of Communications.

TRANSITORY ARTICLES

Article 3.—Maritime communications companies operating public passenger and freight service on the date of the publication of this Law are bound to present their tariffs to the Secretariat of Communications for revision within a term not exceeding 3 months reckoned from the date of publication of this Law.

Article 10.—The Law of General Lines of Com-

Libelant's Exhibit No. 2—(Continued)

munication dated August 29, 1932, the Postal Code of April 22, 1926, and all Regulations of same, are hereby repealed. The Regulations of the first mentioned Law are applicable in so far as they do not conflict with the provisions of the present Law until such time as new Regulations are enacted.

Article 13.—This Law shall go into force on the date of its publication in the "Diario Oficial" of the Federation.

(Signed) **JOSE ESCUDERO ANDRADE,**
Deputy President.
JOSE MARIA DAVILA,
Senator Vice-President.
ADAN VELARDE,
Deputy Secretary.
VICENTE L. BENITEZ,
Senator Secretary.

In Fulfilment of the Provisions of Section I of Article 89 of the Political Constitution of the Mexican United States, and for its publication and observance, I issue this Decree at the seat of the Federal Executive Power in the City of Mexico, D. F., on the 30th December, 1939.

(Signed) **LAZARO CARDENAS,**
The Secretary of State in
charge of Communications
and Public Works.
(Signed) **MELOQUIADES ANGULO C.**
The Head of the Department
of the National Marine.

Libelant's Exhibit No. 2—(Continued)

(Signed)

ROBERTO GOMEZ MAQUEO,

The Sub-Secretary of Finance
and Public Credit in charge
of the Office.

(Signed)

EDUARDO VILLASENOR.

To the C. Ignacio Garcia Tellez,
Secretary of the Interior,
City.

Mr. Henderson: And it is understood that these Articles, as translated, are received by the court in evidence as the equivalent of the original Mexican text of the law, and that no certification, authentication, or other proof shall be required of the law or of the fact that it was at all times mentioned in the libel and now is in effect.

Mr. Jaffray: We agree to that as far as it appears.

Mr. Henderson: We understand that the Republic of Mexico admits for all purposes as follows: The steamships Campeche and Baja California—may I expunge that for the record, in the interests of simplification of this offer?

Mr. Jaffray: Yes; just expunge it.

Mr. Henderson: If that is agreeable to the court.

We understand it to be admitted by proctors for the Republic of Mexico and by said party herein that the facts stated in page 3, line 22, through page 4, line 8, are true and that the same are true for all purposes.

The Court: Of what instrument?

Mr. Jaffray: That is agreed.

The Court: Of what instrument is that?

Mr. Henderson: The instrument referred to is the stipulation dated January 27, 1942.

The Court: What are those references again?

Mr. Henderson: Page 3, line 22, to and including page 4, line 8.

The Court: What is the attitude of proctors for the [58] Republic of Mexico?

Mr. Jaffray: I suppose it is proper to say that we admit that the whole stipulation that we have filed shall be deemed in evidence to all the effects which may be attributed to it.

Mr. Henderson: I take it you do stipulate that this admission is now made?

Mr. Jaffray: Yes. We have already stipulated, and it will be considered to be in evidence as a part of the evidence for both parties.

Mr. Henderson: And I take it you do make that admission now?

Mr. Jaffray: Yes; and also the paragraph D on pages 4, 5, and so on, which is the evidence taken.

[59]

Mr. Henderson: Well, let me go on, if I may.

Mr. Jaffray: Yes. Excuse me.

Mr. Henderson: But as far as item C on page 3 is concerned, the statements there contained are now admitted for all purposes?

Mr. Jaffray: Yes; as stipulated.

Mr. Henderson: Now we refer to page 4 of the stipulation, item D, and we understand it is stipu-

lated that the Republic of Mexico shall be deemed to have called as its witness Martin Gavira Oropesa, the Master of the said Baja California, and that he shall be deemed to have testified in accordance with the facts asserted on page 4, line 14 of said stipulation, to and including page 6, line 15 of said stipulation.

Mr. Jaffray: That is agreed.

Mr. Henderson: The court has made and entered its order in pursuance of the stipulation dated January 27, 1942, and may it be understood that any proceedings herein deviating from the strict terms of the stipulation shall be effective by order of the court?

Mr. Jaffray: Yes; subject to the order of the court, by either party it may ask to have some deviation for cause.

Mr. Henderson: No. I do not have in mind a deviation from this strict procedure that we have now had; but I do have in mind that the court ordered this proceeding to be followed. [60]

Mr. Jaffray: Yes.

Mr. Henderson: We have deviated from it to some slight degree, and I would like to have the court make its order approving the proceeding that we have followed here.

Mr. Jaffray: Yes; that will be agreeable.

Mr. Henderson: So that we won't be within the teeth of your prior order.

The Court: What is the purpose of asking the court to commit itself on the stipulation of facts

agreed to by the proctors for the respective parties?

Mr. Henderson: My only purpose is to free the court's hands from the order previously made, because herein we have deviated from the strict terms of that order by offering and receiving into evidence certain additional documents.

The Court: With respect to the amplified offer which has been agreed to by the respective proctors the action as agreed to is satisfactory to the court.

Mr. Henderson: In pursuance of the stipulation, we understand oral argument will be waived and that the brief designated "Opening Brief of the Republic of Mexico" shall be considered the Republic's opening brief; that the libelant shall have 7 days from the date of the hearing to file its reply brief and that the Republic of Mexico shall have 3 days after libelant files its reply brief within which to file its reply thereto. That is in pursuance of a stipulation and I understand is agreeable to us and to the [61] other parties, and if that is agreeable to the court we would like to proceed in accordance therewith.

The Court: Before the court announces its attitude on the suggested stipulation, it will make an inquiry. Where is the ship *Baja California* now and what is its status as far as physical possession and presence are concerned?

Mr. Henderson: I understand that she is in the custody of the United States Marshal at Los Angeles Harbor.

The Court: And this arrangement, if it is satisfactory to the court, ties her up for at least 10 days more, doesn't it?

Mr. Henderson: Yes; it does.

The Court: It seems to me that we ought to shorten that under any phase of the jurisdictional question.

Do you hear me, Mr. Jaffray?

Mr. Jaffray: Not as well as I might if I may step here.

The Court: I will restate what I did say. Did you hear the inquiry that I made of Mr. Henderson and of all of you?

Mr. Jaffray: I did not.

The Court: Before indicating whether or not the time—do you hear me now?

Mr. Jaffray: Yes.

The Court: —for the submission of this cause is satisfactory to the court, the court inquired as to where the ship was now and what its status was so far as its physical presence and possession were concerned. Did you [62] hear what Mr. Henderson said?

Mr. Jaffray: He says it is now in the Harbor of Los Angeles.

The Court: And in the custody of the Marshall.

Mr. Jaffray: Yes, sir.

The Court: Under process heretofore issued. Did you hear the court inquire of him that, in that event, if the stipulation were acceded to by the court it would mean a delay of at least 10 days and during that time the ship would be tied up during that period of time?

Mr. Jaffray: Yes; that is true.

The Court: Now I want to restate what the court stated: That it does seem that in view of the existing conditions, historically known and a matter of common knowledge, of which the court takes judicial notice, that that is a little unreasonably long time to delay the submission of this case.

Mr. Henderson: Now, if the court please, we suggest that the stipulation was prepared with a *view* to avoiding technicalities and getting this before the court as quickly as possible, and on the understanding that we should have 7 days and that the order was made in pursuance of that, although that, of course, may be changed by the "Suggestion" filed on behalf of the United States Attorney. That "Suggestion" was served upon us yesterday afternoon and we are proceeding with every bit of diligence, as is shown by the fact of our memorandum of points and authorities and our [63] position on it this morning.

The problems presented by this proceeding which is, in a sense, *sui generis*, are intricate and of complexity, and we feel that we shall need a week within which to prepare an adequate brief for the court, and when that brief is prepared we think it will be of great assistance to the court. We have not even crystallized the evidence upon which our brief is to be made at this time because of other documents which, in pursuance of stipulation, will be forthcoming; and we submit that those documents should be in our hands and we should have an opportunity

to examine them a few days before being required to file our brief. There are documents which have been placed in evidence this morning which we have never seen before this morning, and the issue which is now submitted to the court is the issue that goes to the heart of this litigation. I really think the problems involved require about a week's attention on our part.

Now, if we can shorten it we will do so, but if the court can see its way clear to give us a week we would like to have it, and we think it will in the long run save the time of the court.

Mr. Jaffray: In view of the situation, your Honor, we did file a brief and the 7 days is up tomorrow if they had made their brief following our presentation, but we could not object to it because we had not made the stipulation [64] yet, so we made the stipulation this way. But we feel that the delay is of great interest to the use of this vessel in the present situation.

Mr. Henderson: If the court please, in regard to that I should say I was very much surprised when I received this opening brief. No stipulation had been made at the time and we immediately telephoned proctors for the Republic of Mexico, had a conversation with them, and then sent a letter to those proctors, reading as follows:

"Confirming our telephone conversation of today, we understand it is agreed between us that we shall have 7 days within which to file our brief after a full disclosure of all evidence to be received by the court in support of and in opposition to the "Sug-

gestion by the Republic of Mexico." This disclosure may be made either at the trial on issues, or by stipulation concerning the evidence to be received by the court to be made between you and ourselves. For this purpose we understand you plan to meet with us on Monday at two o'clock, and we presume you will let us know if anything comes up between now and then which will change this arrangement.

"Will you kindly endorse a copy of this letter as approved and return to us?"

We have that letter in our files, and on the conversation during the early part of this week we did draw the stipulation and agree to 7 days. [65]

The Court: The observations of the court were made not so much with respect to factual issues that are presented here, but more particularly with respect to the effect of the *Navemar* case in the Supreme Court of the United States, recorded in 303 U. S., commencing at page 68; and the *enx* of the jurisdictional question, now somewhat amplified and modified by the attitude of the United States Attorney for the Southern District of California, presents rather a crucial issue in the case, where the Supreme Court used this language:

*** * * Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. (Citing two cases.) And in a case such as the present it is open to a friendly government to assert that such is the public status of the vessel and to

claim her immunity from suit, even through diplomatic channels, or, if it chooses, as a claimant in the courts of the United States.

“If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction. (Citing cases.) The foreign government is also entitled as of right upon a proper [66] showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative. (Citing cases.)

“After refusal of the Secretary of State to act upon the present claim, the Ambassador adopted the latter course. His application to be permitted to appear and present the claim was properly entertained by the district court. But it was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive. The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged.

“But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined

to give such a suggestion the force of proof or the status of a like suggestion coming from the executive department of our government. *Ex parte Muir*, supra; *The Pesaro*, supra. *Berizzi Bros. Co. v. The Pesaro*, supra, did not hold otherwise for there it was stipulated that the vessel, when arrested, was owned, possessed and controlled by a foreign government and used by it in carrying merchandise for hire. [67] The sole question was one of law, whether, upon the facts stipulated, the vessel was immune from suit.

“The district court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the ‘Navemar’ had been in the possession of the Spanish government. The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was in invitum, actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful. *The Davis*, 10 Wall, 15, 21; *Long v. The Tampico*, 16 Fed. 491, 493, 494; *The Attualita*, supra; *The Carlo Poma*, 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, or at least some recognition on the part of the ship’s officers that they were controlling the vessel and crew in behalf of their government. Both were lacking, as was support for any contention that the vessel was in fact employed in public service. See *Long v. The Tampico*, supra, 493, 494; cf. *Berizzi Bros. Co. v. The Pesaro*, supra.

“The district court rightly declined to treat the

suggestion as conclusive or sufficient as proof to require the court to relinquish its jurisdiction. But as the suggestion was tendered in support of an application to appear as a claimant in the suit, and as it put forth a claim to title and right to possession of the vessel, the [68] Ambassador should have been permitted to intervene and, if so advised, to litigate its claims in the suit. In *Ex parte Muir*, *supra*, and in *The Pesaro*, *supra*, 219, the Ambassador of the intervening government challenged the jurisdiction of the court, but did not place himself or his government in the attitude of a suitor. Here the application as construed by the trial court was for permission to intervene as a claimant. We think the applicant should be permitted to occupy that position if so advised.

“The decree of the Court of Appeals will be reversed. The respondent will be permitted to intervene for the purpose of asserting the Spanish Government’s ownership and right to possession of the vessel, and the order of the district court will be modified accordingly.”

The documents presented in the instant proceeding consist of an authenticated or an accredited translation of a document emanating from the Embassy of Mexico at Washington, D. C., dated January 6, 1942, and addressed to “His Excellency Cordell Hull, Secretary of State,” and among other things the following statement appears: —the document purports to be signed “F. Castillo Najera, Ambassador.”

“Mr. Secretary:

“On instructions from my Government, I have the honor to submit the following facts for Your Excellency’s consideration to the end that, if possible, the Department of State under your worthy direction may give the pertinent instructions. [69] through the Attorney General of the United States of America, for the purpose of having the District Court of California, with jurisdiction in the port of Los Angeles, lift the attachment which it has ordered against the steamship ‘Baja California’ belonging to the Government of my country.”

I omit reading other portions of it which are considered by the court to be not pertinent to the observation under consideration.

“The apparent basis of the attachment procedure lies in the fact that both vessels, the ‘Compeche’ and the ‘Baja California’, are operated by the ‘Compania Mexicana de Navagacion del Pacifico, S. de R. L.’, in reality the two ships belong to the Government of Mexico, as is proved by the operating contract, a copy of which is enclosed with the present note. [70]

“In the face of this situation, my Government believes it pertinent to invoke the rule accepted by international law which establishes the immunity of vessels belonging to a foreign state against proceedings issuing from domestic courts. In this respect, the very recent decisions in the ‘Navemar’ and ‘San Ricardo’ cases are recalled.

“The ‘Navemar’ case specifically supports Your Excellency’s direct intervention to obtain the immediate recognition of the immunity of the vessel

‘Baja California’ for the purpose of avoiding the sequel of judicial proceedings, necessarily slow, which will cause unnecessary injury to all the contending parties and, in the end, to the Mexican State.”

I omit some further observations which are deemed not pertinent to the observations of the court. The communication proceeds:

“The Government of Mexico believes that expenses and difficulties of moment could be avoided, expenses and difficulties of use to no one, if the Attorney General of the United States of America should be instructed to obtain, by the appropriate means, a nullification of the aforesaid writ of attachment, issued by the District Court with jurisdiction in Los Angeles, California, in view of the fact that the said judicial order may be considered as a violation of the provisions of an international treaty in force and that, in addition, it represents a disregard of the [71] rule of immunity from the jurisdiction of the domestic judicial authorities which protects vessels belonging to a foreign State.

“In thanking Your Excellency for the attention which you may be good enough to give this matter, I beg to emphasize the urgency which the settlement of this case has for the interests of the Government of Mexico.”

The authenticated or accredited reply, indicated by the letter of the Assistant Secretary of State to the Attorney General of the United States, reads, in so far as pertinent to the observations, thus:

“My dear Mr. Attorney General:

“I enclose for your information a copy in translation of a note dated January 6, 1942 and a copy of its enclosure from the Mexican Ambassador in this city relating to a libel filed in the United States District Court for the Southern District of California (Central Division) against the steamship Baja California, on account of damages sustained by the pilot boat Lottie Garson (or Carson) in a collision with the steamship Campeche in the harbor of Mazatlan, Mexico.

“You will observe that the Ambassador states that

“The apparent basis of the attachment procedure lies in the fact that both vessels, the Campeche and the Baja California, are operated by the “Compania Mexicana de Navegacion del Pacifico, S. de R. L.” But, [72] in reality, the two ships belong to the Government of Mexico as is proved by the operating contract, a copy of which is enclosed with the present note.”

“The ambassador desires that through you instructions be given for the purpose of having the District Court dismiss the libel.

“Although this Department heretofore generally has declined to comply with such a request when the vessel, as in this case, is engaged in the carrying of merchandise for hire, it would be appreciated if in this instance you would instruct the United States Attorney at Los Angeles to appear before

the ~~above~~-mentioned court and to report to it the position of the Mexican Government as set forth in the Embassy's note."

Pursuant thereto the Assistant United States Attorney who appeared this morning has filed on behalf of the United States Attorney the document which is in the files, which appears to have been marked "Filed" on January 28, 1941.

There appear to be some distinctions between the proceedings in the instant suit and those recounted in 1941 A. M. C. at page 1737 which reports the Maliakos in the Southern District of New York. There the Secretary of State of the United States, in his communication to the Attorney General of the United States, states the following: —omitting a portion of the language which is unnecessary in the matter at hand—— [73]

"* * * the Secretary of State, on August 25, 1941, sent to the Attorney General copies of the two notes from the Greek Minister, and requested him to instruct the appropriate United States Attorney to appear in the proceedings in the first entitled action, and to state to the court that the State Department 'accepts as true the statements of facts contained in the Greek Minister's notes.' The Honorable Mathias F. Correa, United States Attorney for this District, on September 3, 1941, did as requested, and his suggestion of immunity is a part of the record."

It may be that that differentiating situation justifies some further consideration of the matter on the jurisdictional plea, but it seems to me that the evi-

dence can be pretty well marshaled and briefed and argued from either point of view within five days, Mr. Henderson.

Mr. Henderson: That will be perfectly all right, your Honor.

The Court: Five days, and then I would think that the three days' time would be sufficient. I think we all should bear in mind that, regardless of the issues here which seem to be, to some extent, of a private character, we are dealing with a ship on the West Coast of the United States, and ships are very valuable these days.

With that observation, the matter will be submitted according to and pursuant to the stipulation.

[Endorsed]: Filed May 15, 1942. [74]

Copy

Jan 31 1942

1:10 P.M.

To Francis Biddle Attorney General

Re Hoffman versus SS Baja California, 1961-BH Southern District of California. Court desires clarification of State Departments position re Mexican Governments request that above libel be dismissed. Advise if claim of Mexican Government which State Department has requested be reported to the Court is limited to the excerpt from letter of Mexican Ambassador, dated January 6, 1942, quoted by Secretary of State in letter to you or whether excerpt

is not intended to limit claim *tf* Mexican Government to grounds set forth in excerpt. In other words, is position of State Department clearly and ultimately expressed if excerpt and references thereto are deleted. Urgent.

UNITED STATES ATTORNEY,
Los Angeles California

End

MK End

(Copy)

1962 BH

[Endorsed]: Filed Feb. 13, 1942. [75]

(Copy)

Western Union

LDT56 CF 119 Govt Dayletter 2 Extra

Annrad FtMacArthur Calif Feb 3, 1942 1236AM

William Fleet Palmer Esq

US Attorneys LosA

Re Hoffman versus Baja Calif Stop Answering your telegram Jan 31 State Department advises as follows Colon Claim of Mexican Government which State Dept has requested be reported to the Court **is not limited to the excerpt** from the letter of Mexican Ambassador dated Jan 6, 1942 quoted by the Secty of State Stop The excerpt is not intended to limit claim of Mexican Government to the grounds set forth in except Stop State Department desires that as a matter of comity between the two governments there be reported to the Court the entire communication of the Mexican Ambassador Stop Posi-

tion of State Department is clearly and ultimately expressed if the excerpt and references thereto are deleted

SHEA AAG WASHN DC

113A

1962-BH

[Endorsed]: Filed Feb. 13, 1942. [76]

At a stated term, to wit: The September Term, A. D. 1941 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 29th day of January in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable: Paul J. McCormick, District Judge.

[Title of Cause.]

No. 1961-BH Adm.

ORDER THAT CAUSE BE SUBMITTED FOR
DECISION ON BRIEF

'This cause coming on for hearing; Jo Henderson, Esq., appearing as proctor for libelant; Ben Van Tress and James R. Jaffray, Esqs., appearing as proctors for respondents; Marvin Dean, Assistant U. S. Attorney, being present for Wm. Fleet Palmer, U. S. Attorney; and A. H. Bargion, Court

Reporter, being present and reporting the proceedings:

At 10:20 A. M. Attorney Dean makes a statement. Attorney Henderson makes a statement and presents "Statement of Libelants' Position", etc., which is ordered filed herein. Attorney Jaffray makes a reply statement. The following exhibits are offered and admitted in evidence:

Resp. Ex. A—"Contract" in Spanish, dated October 3, 1941.

Resp. Ex. B1 and B2—Translations of contract by libelant and by Republic of Mexico.

Resp. Ex. C—Certificate #6615, 12/23/41.

Resp. Ex. D—Form of authorization, 12/23/41.

Resp. Ex. E1, E2, E3, & E4—Letter 1/27/42, Letter 1/17/42, and translations. /

Resp. Ex. F—Group of "Correos y Telegrafos" (12).

Resp. Ex. G & G1—Letter dated 11/3/41 and translation attached.

Attorney Jaffray now presents opening brief, which is ordered filed herein. At 11:10 A. M. Republic of Mexico rests. Attorney Henderson offers on behalf of the Libelant: [77]

Libelant's Ex. 1A—"Inward Foreign Manifest" Sheet No. 1.

Libelant's Ex. 1B—"Manifesto", etc., 11/28/41 and papers attached.

Libelant's Ex. 1C—"Inward Foreign Manifest" (copy).

Libelant's Ex. 1D—"Manifesto", etc., 11/28/41, and papers attached.

Libelant's Ex. 2—"Law of General Lines of Communication", etc.

Attorney Henderson now makes closing statement.

It is ordered that this cause be submitted for decision on brief to be filed by libelant in five days and three days are allowed to the respondent to reply.

25/36 [78]

[Title of District Court and Cause.]

ORDER AND DECREE DENYING SOVEREIGN IMMUNITY AND RELEASE OF ATTACHED MEXICAN STEAMSHIP "BAJA CALIFORNIA" WITHOUT PREJUDICE, ETC.

Upon consideration of the entire record of this proceeding, including telegraphic communications between United States governmental departments occurring subsequent to the hearing in court of the issues upon the "suggestion" by the Republic of Mexico and the "suggestion" by the United States Attorney for the Southern District of California, we are unable at this time to find under the controlling rule of the United States Supreme Court established in *Compania Espanola de Navegacion Maritima, S.A., v. The Navemar, et al.*, (1938), 303 U.S. 68, any requirement or ground ousting the jurisdiction of this court in this admiralty proceeding. Accordingly, the "suggestion" of the Repub-

lie of Mexico for dismissal of the libel is respectfully declined, and the Mexican Steamship "Baja California," her engines, tackle, apparel and furniture, remain under arrest and attachment and in the custody of the United States Marshal for the Southern District of California until further order of this court.

The foregoing order is in toto made and entered without prejudice to intervention and/or claim herein by [79] the Republic of Mexico and/or the Ambassador to the United States for the Republic of Mexico and/or his accredited representative and agent, within twenty days from this date, for the purpose of asserting the Mexican Government's ownership and right to possession of the vessel in controversy, and any other applicable remedy or relief. Exceptions allowed Republic of Mexico, Ambassador to the United States for the Republic of Mexico and Consul of Mexican Government at Los Angeles, California.

Dated February 13, 1942:

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Feb. 13, 1942. [80]

[Title of District Court and Cause.]

**STIPULATION AND ORDER EXTENDING
TIME TO CLAIM AND ANSWER**

It Is Hereby Stipulated that the Republic of Mexico shall have to and including the 16th day of

March, 1942, within which to file its stipulation for costs (as provided for by General Admiralty Rule 24 and Local Admiralty Rule 92), its claim (as provided for by General Admiralty Rule 25), and to answer the libel herein.

Dates this 5th day of March, 1942.

BEN VAN TRESS and

JAMES R. JAFFRAY

By JAMES R. JAFFRAY

Proctors for the Republic of
Mexico

McCUTCHEN, OLNEY, MAN-
NON & GREENE

JO HENDERSON

Proctors for Libelant

It is so ordered.

PAUL J. McCORMICK

Presiding Judge

[Endorsed]: Filed Mar. 5, 1942. [81]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME TO CLAIM AND ANSWER

It Is Hereby Stipulated that the Republic of Mexico shall have to and including the 26th day of March, 1942, within which to file its stipulation for costs (as provided for by General Admiralty Rule 24 and Local Admiralty Rule 92), its claim (as pro-

vided for by General Admiralty Rule 25), and to answer the libel herein.

Dated this 16th day of March, 1942.

BEN VAN TRESS and

JAMES R. JAFFRAY

By JAMES R. JAFFRAY

Proctors for the Republic of
Mexico

McCUTCHEN, OLNEY, MAN-
NON & GREENE

By JO HENDERSON

Proctors for Libelant

It is so ordered.

PAUL J. McCORMICK

Presiding Judge

[Endorsed]: Filed Mar. 18, 1942. [82]

[Title of District Court and Cause.]

ANSWER

The the Honorable, the Judges of the above entitled
court:

The Answer of the Republic of Mexico as owner of the steamship Baja California, as the same is proceeded against upon the libel of R. B. Hoffman, in a cause of collision, civil and maritime, alleges as follows:

I.

Claimant denies any knowledge or information sufficient to form a belief as to the allegations of the first article of the libel.

II.

Claimant admits the allegation of the Second article of the libel.

III.

Claimant admits that Cia Mexican de Navegacion del Pacifico, S. A. was at all of the times herein mentioned and now is a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico.

IV.

Claimant admits that during the morning of October 19, 1941, the Mexican steamship Campeches, which had been lying at anchor in the harbor of Mazatlan and farther out and in a southeasterly [83] direction from the Lottie Carson, caught fire. That said fire was first observed at about 11:00 A.M. That thereafter said Campeche was taken from her anchorage and towed by the Baja California.

Further answering denies any knowledge or information sufficient to form a belief as to the other allegations of the Fourth article of the libel.

V.

Further answering denies any knowledge or information sufficient to form a belief as to the allegations of the Fifth article of the libel.

VI.

Further answering denies any knowledge or information sufficient to form a belief as to the allegations of the Sixth article of the libel.

VII.

Claimant denies the allegations of the Seventh article of the libel.

VIII.

Claimant denies the allegations of the Eighth article of the libel.

IX.

Claimant denies the allegations of the Ninth article of the libel.

X.

Claimant denies the allegations of the Tenth article of the libel.

XI.

Claimant denies the allegations of the Eleventh article of the libel.

X.

XII.

Claimant denies the allegation of the Twelfth article of the libel. [84]

XIII.

Claimant denies the allegations of the Thirteenth article of the libel.

XIV.

Claimant answers this libel in accordance with the admiralty and maritime jurisdiction of the United States of America but retains the right to

claim the immunity of the vessel; and to claim the lack of jurisdiction of the courts of the United States of America by virtue of the sinking having occurred in Mexican territorial waters.

XV.

Furthering answering claimant alleges the true facts to be as follows:

The Baja California, the Campeche and the Lottie Carson were at anchor in the harbor when the Campeche took fire. The Port-Captain came in a launch to the Baja California, and ordered Captain Gavica to tow the Campeche north, up the harbor to the beach, its sea-cocks having been opened, which was obeyed by towing until the Baja California was in danger of the shallow water, when the tow rope was cut and the Baja California succeeded in turning to the east, avoiding the shallow.

Before towing started, the Port-Captain ordered the Lottie Carson to pull out of the way, and sent a tug to tow it out of the way. The captain of the Lottie Carson failed to pull up its anchor and the tug was unable to move it while anchored.

The Campeche stopped, when the *two* rope was cut, to the west of the Lottie Carson and started drifting east, from the force of the wind. The towing lasted an hour, and the drifting *last* a half hour, bringing the Campeche up against the Lottie Carson. The captain of the Lottie Carson then loosed it from its anchor and the tug towed the Campeche northwesterly to the shallow water. The Port Captain's launch then towed the Lottie Carson south-

westerly and the tug then towed it north to a spot near the Campeche, and then east a short distance, where the Lottie Carson sunk in the shallow. Said occurrences took place on October 19, 1941. [85]

XVI.

Said collision and consequent damage were not caused or contributed to by any fault or neglect on the part of the Baja California, or those in charge of her, but were caused solely by the fault and negligence of the Lottie Carson, her owners, operators and those in charge of her in the following respects, among others:

1. In carelessly and negligently failing and refusing to obey the orders of the Port Captain to move the Lottie Carson out of the way before the Campeche was towed toward the shore as ordered by the Port Captain.

2. In carelessly and negligently failing and refusing to move the Lottie Carson out of the way before the Campeche was towed to the north as ordered by the Port Captain.

3. In carelessly and negligently failing and refusing to loose the Lottie Carson from its anchor and permitting the tug Tepic to tow it out of the way before the Campeche was towed as ordered by the Port Captain.

4. In carelessly and negligently failing and refusing to loose its anchor and permit the removal of the Lottie Carson from the way before the towing of the Campeche, when or at any time after warning given it by the Baja California, which was given

in full and proper time for such removal of the Lottie Carson.

XVII.

Claimant expressly reserves the right of sovereign immunity inherent in said Republic of Mexico.

XVIII.

ANSWERS TO INTERROGATORIES
ATTACHED TO THE LIBEL

1. Captain Martin Gavica on the 19th day of October, 1941, was in charge of the management and operation of the Baja California, and at the time the Campeche was being towed he was acting under the order of Rafael Verzunza Costello, Captain of the port of Mazatlan. [86]

2. He then was in the employ of the respondent.

3. The respondent at the time stated was a party to an agreement with the Republic of Mexico, which agreement appears by copy in the files of this action as Exhibit A.

4. See No. 3.

5. See Exhibit A, filed in this action.

6. A two (2) inch new manilla rope.

a) 600 feet.

b) and c) By wire fastening into a bit.

7. When the Baja California approached the shallows, it could no longer maneuver to make a turn.

8. It was ordered into the harbor by the Port Captain to beach it, its sea cocks being opened.

9. To the shallows at the north of the harbor.
10. Not over two (2) miles an hour.
11. Weather fair. Wind gentle from the south-east, then toward the east toward the Lottie Carson. The tide was at the ebb.

Wherefore, claimant prays that the said vessel may be released and this libel be dismissed, with costs.

**BEN VAN TRESS and
JAMES R. JAFFRAY
BEN VAN TRESS**

**Proctor for the Republic of
Mexico [87]**

State of California

County of Los Angeles—ss.

Rodolfo Salazar, Consul at Los Angeles for said Republic of Mexico, herein duly authorized, makes this verification for said Republic of Mexico; that he has read the foregoing Answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the source of his knowledge is memoranda prepared from interviews with witnesses and other documents and records supplied by said Republic of Mexico.

R SALAZAR

Subscribed and Sworn to before me this 30 day of March, 1942.

(Seal) **BEN VAN TRESS**

Notary Public in and for the County of Los Angeles, State of California [88]

INTERROGATORIES PROPOUNDED BY THE
REPUBLIC OF MEXICO TO LIBELANT

1. Why was not the Lottie Carson towed out of the way before the towing of the Campeche began?

2. Why did not the Lottie Carson obey the orders of the Port captain to move out of the way?

3. Why did the Lottie Carson fail to loose her anchor before or when the tug Tepic was trying to tow her?

4. What was the time between when the Campeche was started being towed and when the collision occurred?

5. How long was it from the time when the tow rope was cut from the Baja California until such collision?

6. How far apart then were the Campeche and the Lottie Carson?

7. State fully what the tidal, wind and weather conditions were at the time the Campeche was being towed, giving direction and strength of wind and tide.

8. How far from the east shore of the harbor did the Lottie Carson lay?

9. In what direction was its port side?

10. How far was the Campeche from the Lottie Carson when towing stopped, and in what direction?

11. At what time did the Campeche arrive at such place where towing stopped?

12. In what direction did the wind then blow?

13. In what direction did the wind then run?

14. In what direction did the wind blow when the towing started?

15. In what direction did the tide run when the towing started?

16. Did the Lottie Carson remain still from the time the towing started to the time of the collision?

17. Before the collision did the Baja California move [89] south, and pass the Lottie Carson on the east?

18. Was the Lottie Carson then still anchored?

19. Did the Captain of the Baja California then warn the Lottie Carson to slip her anchor?

20. Was the tug Tepic then pulling on the Lottie Carson?

21. Was the Lottie Carson towed any distance before the collision?

22. How wide was the harbor, measuring east and west, from where the Lottie Carson was anchored?

23. What were the existing circumstances and conditions at the time referred to in your interrogatory #2?

24. Had the Lottie Carson received warning of the proposed towing, by the Port Captain or any one, before, during or immediately after the towing?

25. What warning was received?

26. Did the wind change during the towing?

27. At what speed was the towing?

28. What other vessels were then in the harbor, and how many, and where were they anchored?

29. How was the towline improperly rigged?

30. What precautions did the Lottie Carson take to prevent a collision, and when, and how far away was the Campeche?

31. What proper or efficient officers were not on the Baja California, and what proper stations were not occupied; what inattention to duty occurred on the Baja California at or prior to the collision?

32. How deep was the Lottie Carson sunk?

33. What articles referred to in Paragraph IX of the libel were salvaged and what action was taken which incurred the expense of \$750.00?

34. What articles referred to in Paragraph X of the libel were salvaged and what action was taken which incurred the expense of \$750.00?

35. What articles referred to in Paragraph IX were not [90] salvaged, and what was their value?

36. What articles referred to in Paragraph X were not salvaged and what was their value?

37. What was the value of the Lottie Carson?

38. What was the speed of the Campeche at the instant of collision?

39. What was the speed of the Lottie Carson at that time?

[Endorsed]: Filed Mar. 30, 1942. [91]

[Title of District Court and Cause.]

CLAIM

To the Honorable, the Judges of the above entitled Court:

The claim of the Republic of Mexico to the Baja California, her tackle, apparel and furniture now in the custody of the Marshall of the United States for the United States District Court for the Southern District of California Central Division at the suit of R. B. Hoffman alleges:

That the Republic of Mexico is the true and bona fide owner of the said Baja California, her engines, tackle, apparel and furniture, and that no other person is the owner thereof.

Martin Gavica deposes and says that he was and is the master of said vessel, and that at the time of the said arrest thereof, he was in possession of the same as the lawful bailee thereof, for the said owner, and that said owner resides out of the said Southern District of California Central Division, and more than one hundred miles from the city of Los Angeles in said District.

M. GAVICA

State of California

County of Los Angeles—ss.

Subscribed and Sworn to before me this 30th day of March 1942

BEN VAN TRESS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Mar. 30, 1942. [92]

[Title of District Court and Cause.]

CLAIM

To the Honorable, the Judges of the Above Entitled Court:

The claim of the Republic of Mexico by Francisco Castillo Najera, Ambassador of the Republic of Mexico, intervening for the interest of the said Republic in the Steamship Baja California, as the same is libeled in this court by R. B. Hoffman in an alleged cause of damage, civil and maritime, respectfully avers upon information and belief as follows:

First: That the said steamship is and at all times mentioned in the libel filed herein, was the property of the Republic of Mexico, and in its possession.

Second: That the Republic of Mexico has never consented that the said steamship be seized or proceeded against by judicial process or that the Republic of Mexico be sued in respect thereto.

Third: That in appearing herein he desires to plead and establish the immunity of the said steamer from seizure or detention under the process of this Court or other subjection thereto, and the freedom of said steamer from all liens, including the lien herein asserted.

Wherefore, he prays to defend accordingly.

Republic of Mexico by Rodolfo Salazar, Consul [93] at Los Angeles, for said Republic of Mexico, duly authorized.

R. SALAZAR

State of California

County of Los Angeles—ss.

Rodolfo Salazar, Consul at Los Angeles, for said Republic of Mexico, herein duly authorized, being duly sworn, deposes and says that the statements contained in the foregoing claim are true to the best of his knowledge, information and belief.

R. SALAZAR

Subscribed and sworn to before me this 30 day of March, 1942.

(Seal)

BEN VAN TRESS

Notary Public in and for the County and State aforesaid.

[Endorsed]: Filed Mar. 30, 1942. [94]

[Title of District Court and Cause.]

**EXCEPTIONS TO THE "CLAIM" EXECUTED
ON BEHALF OF THE REPUBLIC OF
MEXICO BY THE HONORABLE RO-
DOLPHO SALAZAR.**

The libelant above named hereby excepts to the purported "Claim" executed and presented to this Court on behalf of the Republic of Mexico by the Honorable Rodolpho Salazar on the grounds that the said "Claim" is a claim of sovereign immunity for the steamship *Baja California* and that the issues thereby raised may not properly be considered by the Court for the following reasons:

First: The claim of sovereign immunity of the

Republic of Mexico for the said Baja California was fully considered by the Court and was finally determined by the Order and Decree of the Honorable Paul J. McCormick, United States District Judge, dated February 13, 1942, and duly filed and entered herein. [95]

Second: Apart from the aforementioned Order and Decree, the privilege of the Republic of Mexico to assert a claim of sovereign immunity for the said Baja California has been waived by the said Republic entering a general appearance herein.

Wherefore, the libelant prays that the said purported "Claim" be stricken from the files.

Dated: Los Angeles, California, April 4, 1942.

McCUTCHEN, OLNEY,

MANNON & GREENE

Proctors for Libelant

[Endorsed]: Filed Apr. 4, 1942

[96]

[Title of District Court and Cause.]

EXCEPTIONS TO THE ANSWER

The Libelant above named hereby excepts to the answer of the Republic of Mexico, as follows:

First, That the allegation in the fourteenth article of said answer as follows, to-wit "Claimant answers this libel in accordance with the admiralty and maritime jurisdiction of the United States of America but retains the right to claim the immunity of the vessel," attempts to assert a claim which has already

been determined by the Court and which has, moreover, been waived by the said Republic's general appearance herein.

Second, That the objection to the Court's jurisdiction contained in the allegation in the fourteenth article of said answer as follows, to-wit, "Claimant answers this libel in [97] accordance with the admiralty and maritime jurisdiction of the United States of America but retains the right . . . to claim the lack of jurisdiction of the courts of the United States of America by virtue of the sinking have occurred in Mexican territorial waters" is without merit.

Third, That the allegation in the seventeenth article of said answer as follows, to-wit: "Claimant expressly reserves the right of sovereign immunity inherent in said Republic of Mexico" attempts to assert a claim which has already been determined by the Court and which has, moreover, been waived by the said Republic's general appearance herein.

Wherefore, the libellant prays that the seventeenth article of the said answer and all of the fourteenth article of the said answer, except for the following words, "Claimant answers this libel in accordance with the admiralty and maritime jurisdiction of the United States of America" be stricken from the said answer.

Dated, Los Angeles, California, April 4, 1942.

McCUTCHEN, OLNEY,
MANNON & GREENE
Proctors for Libellant

[Endorsed]: Filed Apr. 4, 1942 [98]

[Title of District Court and Cause.]

SUGGESTION BY THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

To: The Honorable United States District Court
For the Southern District of California:

I, Wm. Fleet Palmer, United States Attorney for the Southern District of California, acting under the direction of the Attorney General of the United States, respectfully bring to the attention of the Court that the Attorney General of the United States has received from the Secretary of State of the United States, a communication which is attached hereto as "Exhibit A" and hereby incorporated herein by reference, to the effect that the Ambassador of the [99] Republic of Mexico has informed the Department of State that the Government of Mexico will meet any liability which may be declared directly against the SS Baja California.

A copy of the communication directed to the Secretary of State by the Mexican Ambassador, together with a translation thereof, is attached hereto as "Exhibit B" and hereby incorporated herein by reference.

In bringing this matter to the attention of the Court, the United States does not intervene as an interested party; nor do I appear either on behalf of the United States or for the Government of Mexico. I present this Suggestion as a matter of comity between the United States Government and the Gov-

ernment of Mexico, for such consideration as this Court may deem necessary and proper.

WM. FLEET PALMER

United States Attorney

Los Angeles, California, April 8, 1942. [100]

EXHIBIT "A"

COPY

Department of State

Washington

March 27, 1942

Address Official Communications to

The Secretary of State

Washington, D. C.

In reply refer to

LE 311.1253 Baja California/16

My dear Mr. Attorney General:

Attached is a copy of a note dated March 23, 1942, addressed to the Department by the Mexican Ambassador, and a translation thereof, regarding libel proceedings pending against the steamship Baja California in the United States District Court for the Southern District of California, Central Division.

It will be noted that the Ambassador states that the vessel is the property of the Mexican Government and that as a matter of international law it is entitled to immunity from the jurisdiction of the court; and that even if a judgment should be entered in favor of the libellant in the pending proceedings, it

could not be executed against the ship, the public property of the Mexican State. He states, however, that if, contrary to his Government's contention that under international law execution of the judgment against the vessel may not be had "the courts decide that execution may be had against the vessel, the Government of Mexico will meet any liability which may be declared directly against it."

The Department accepts as true the statement that the vessel is the property of the Mexican State. This appears also to have been accepted by proctors for the libelant, as shown by paragraph (4) of the attached copy of a document which apparently was submitted to the court by them under the heading "Analysis of the Note of the Honorable F. Castillo Najera."

The statement by the Ambassador that his Government binds itself to meet any liability which may be declared directly against the vessel is regarded by the Department as a binding international undertaking.

I shall appreciate it if you will bring to the attention of the court a copy of the Ambassador's note, together with a copy of this communication, for its respectful consideration.

Sincerely yours,

(Signed)

SUMNER WELLES

Acting Secretary

Enclosures:

1. From Mexican Ambassador, Mar. 23, 1942, with translation.
2. Document submitted to court by proctors for the libelant. [101]

EXHIBIT "B"

(Copy)

Washington, D.C., a 23 de marzo de 1942.

Senor Secretario:

Tengo la honra de referirme nuevamente al caso del "Baja California," barco mexicano contra el cual una orden de embargo ha sido dictada por la Corte de Distrito del Distrito de Los Angeles, California, en el juicio numero 1961 BH, iniciado por R. B. Hoffman.

El Consulado de Mexico en Los Angeles, California, recientemente envio a la Embajada copias de determinados escritos y resoluciones judiciales cuyo estudio ha inducido a la Embajada a modificar algunas de sus conclusiones anteriores pero que, en terminos generales, ha confirmado el punto de vista de mi Gobierno de que, en el caso de referencia, se esta siguiendo un procedimiento contrario al Derecho Internacional.

La Embajada habfa interpretado la resolucion de la Corte, titulada Order and Decree Denying Sovereign Immunity, etc., de fecha 13 de febrero de 1942, como la negacion de la solicitud de inmunidad de mi Gobierno, basada en la conclusion de que su derecho de propiedad sobre la embarcacion no habia quedado comprobado. Esta premisa indujo a la Embajada a concluir que la autoridad judicial norteamericana de referencia habia incurrido en error al rehusarse a reconocer que el derecho de propiedad del Gobierno de Mexico sobre el barco habia sido comprobado prima facie mediante las pruebas presentadas en Special Appearance.

Exhibit B—(Continued)

Esta conclusion ha sido modificada en vista de que las copias de las actuaciones judiciales a que se viene haciendo referencia, parecen

Excelentísimo Señor

Cordell Hull

Secretario de Estado

etc., etc., etc., [102]

parecen indicar qua el actoren el presente caso expresamente ha aceptado que el "Baja California" es da la propiedad del Gobierno mexicano. A este respecto, me es grato remitir a Vuestra Excelencia una copia del Libelant's Brief in Opposition, etc. El capitulo de este escrito, intitulado Analysis of the Note of the Honorable F. Castillo Najera contiene la siguiente declaracion sobre la cual deseo llamar la atencion de Vuestra Excelencia: "El parrafo (4) . . . correctamente dice que estas embarcaciones (el 'Baja California' y el 'Campeche') pertenecen al Gobierno mexicano."

La Embajada agradeceria que el Departamento de Estado le devolviera esta copia despues de haberla examinado y tiene la honra de anexar a esta nota * copias en triplicado del capitulo de referencia para el uso del Departamento.

Mi Gobierno sostiene que, tan pronto como el actor acepto que mi Gobierno tiene la propiedad de la embarcacion "Baja California," todo procedimiento in rem debio terminar. El que la Corte de Distrito de los Estados Unidos lo haya continuado equivale a colocar a mi Gobierno en la posicion de parte demandada en un juicio. A este respecto, mi Gobierno

Exhibit B—(Continued)

sostiene que es regla de Derecho Internacional—aceptada sin discusion—que los tribunales de un pais no tienen facultades para juzgar a una nacion soberana extranjera.

La base de esta tesis descansa no solo sobre principios del Derecho Internacional sino tambien en el hecho de que los Tribunales del Gobierno de Vuestra Excelencia han establecido que no esta dentro de sus facultades ejecutar sus sentencias en bienes de naciones soberanas extranjeras con las que se sostienen relaciones de amistad. Cuando menos en una ocasion, esta tesis ha sido llevada al extremo de sostener que es valida aunque la nacion extranjera se hubiere sometido a la jurisdiccion de las autoridades judiciales del Gobierno de Vuestra Excelencia. [103]

En efecto, mi Gobierno tiene entendido que en el caso de Dexter & Carpenter el Gobierno de Suecia se habia sometido a la jurisdiccion de los Tribunales de los Estados Unidos de America. A pesar de ello, la Corte de Circuito de Apelaciones norteamericana sostuvo que la sentencia en contra del Gobierno sueco no podia ser ejecutada en los bienes que habian sido embargados en atencion a que Suecia habia comprobado su derecho de propiedad sobre los mismos (43 F (2) 705, 708).

Mi Gobierno tiene entendido que la facultad judicial de embargo es esencialmente identica a la facultad que ejercitan los Tribunales al ejecutar una sentencia sobre bienes embargados. En tal virtud, la declaracion aqui contenida de que la Corte de Distrito en el presente caso debio haber levantado el

Exhibit B—(Continued)

embargo tan pronto como la parte actora acepto que la propiedad del barco a favor del Gobierno de Mexico habia sido comprobada, parece estar apoyada tambien en principios aceptados por la jurisprudencia norteamericana.

Ademas, debe tomarse en consideracion el hecho de que—independientemente de la similitud entre la facultad de embargo y la de remate—el procedimiento que esta observando la Corte de Distrito es inutil, pues si la jurisprudencia norteamericana ha aceptado la regla de Derecho Internacional de que los bienes de una nacion soberana con la que se sostienen relaciones de amistad son inmunes a las ventas forzadas, el embargo del vapor “Bajo California” de ninguna manera podra ser considerado como una garantia efectiva de los derechos de las parte actora.

En vista de lo anterior, la Embajada considera que este embargo (a) viola el Derecho Internacional, (b) contraviene una practica establecida del Derecho norteamericano y (c) no proporciona al actor ninguna garantia efectiva de ejecucion. [104]

En consecuencia, tengo la honra de solicitar los buenos oficios de Vuestra Excelencia con el fin de obtener el inmediato levantamiento del embargo que ha sido trabado sobre la embarcacion “Baja California” en los procedimientos judiciales iniciados por R. B. Hoffman ante la Corte de Distrito de los Estados Unidos para el Distrito Sur de California, Division Central, en Los Angeles, en la inteligencia de que, si contrariando la tesis de mi Gobierno de que, conforme al Derecho Internacional, es imposible ejecutar una sentencia en una embarcacion pertene-

Exhibit B—(Continued)

ciente a una nacion soberana extranjera con la que se sostienen relaciones de amistad, los Tribunales decidieran que si tienen facultad de rematar la embarcacion, el Gobierno de Mexico hara frente a cualquiera obligacion que sea declarada directamente en su contra.

9 Mi Gobierno se compromete en la forma indicada solo con el proposito de facilitar la intervencion de Vuestra Excelencia que he tenido la honra de solicitar. En tal virtud, su determinacion no sera considerada como precedente para los casos de esta naturaleza que lleguen a plantearse en lo futuro, ni como la aceptacion de la legalidad de los procedimientos seguidos por las autoridades judiciales de los Estados Unidos de America en contra del mencionado barco "Baja California." Esta determinacion, ademas, no debera ser interpretada como la renuncia a ningun recurso legal a que tenga derecho mi Gobierno de acuerdo con el Derecho Internacional o con el derecho escrito y jurisprudencia de los Estados Unidos de America. En consecuencia, mi Gobierno podra reclamar, por los conductos diplomaticos de costumbre, todas y cada una de las denegaciones de justicia que hayan sido cometidas o que se cometan en lo futuro en este caso por los Tribunales del Gobierno de Vuestra Excelencia. Mi Gobierno, igualmente, podra hacer uso de todos y cada uno de los recursos que el Derecho norteamericano pone a su disposicion. [105]

Este caso presenta todavia otro aspecto que deseo

Exhibit B—(Continued)

someter a la consideracion de Vuestra Excelencia. Los hechos del caso que han dado lugar al litigio—colision del vapor mexicano “Campeche” y el “Lottie Carson”—ocurrieron en aguas nacionales de Mexico. Lo anterior no parece haber sido refutado. A pesar de ello, la parte actora ha escogido como tribunal a una Corte que se encuentra a una distancia considerable del lugar en que ocurrieron los hechos en que se basa el litigio. Este curso de accion no solo constituye una violacion de la internacionalmente aceptada *lex regit actum* sino que tambien ha hecho imposible el que los representantes de mi Gobierno ante la Corte de Distrito de los Estados Unidos presenten convenientemente los hechos involucrados y defiendan, en forma adecuada, los derechos e inmunidades del Gobierno.

Es de suponerse que el Derecho mexicano tendra que ser probado y que habren de ser exhibidas declaraciones de testigos que residen a gran distancia de la Corte. La irregularidad de este procedimiento aparece con mayor claridad si se considera que la parte actora tenia libre y franco acceso al unico tribunal con autoridad jurisdiccional y con las facilidades necesarias a su disposicion para llevar a cabo un juicio apropiado y regular—el Juzgado de Distrito mexicano mas proximo al lugar en que ocurrio la colision.

A este respecto, he sido informado que, en 26 de marzo de 1942, terminara el periodo senalado por la Corte de Distrito de los Estados Unidos para exhibir pruebas relativas a importantes puntos del caso. Mi

Exhibit B—(Continued)

Gobierno desea expresar aqui que la presentacion de tales pruebas y los alegatos que posiblemente formulen ante la Corte sus representantes, no deberan ser interpretados como la renuncia a ninguno de sus derechos o inmunidades de nacion soberana. [106]

Mi Gobierno me ha dado instrucciones, ademas, de solicitar la intervencion de Vuestra Excelencia con el fin de obtener una prorroga del plazo que termina en 26 de marzo de 1942. La prorroga de este plazo es indispensable si se desea dar a mi Gobierno una oportunidad adecuada para defender sus derechos y para presentar, de una manera completa, los hechos involucrados.

Tengo la honra de expresar el profundo agradecimiento de mi Gobierno por la ayuda de Vuestra Excelencia en un caso que preocupa seriamente al Gobierno de Mexico.

Aprovecho la oportunidad para renovar a Vuestra Excelencia las seguridades de mi mas alta y distinguida consideracion.

Embajador. [107]

TRANSLATION

(Copy)

Washington, D. C., March 23, 1942

Mr. Secretary:

I have the honor to refer again to the case of the "Baja California," a Mexican vessel against which a writ of attachment has been issued by the District Court for the District of Los Angeles, California, in libel Number 1961-BH, filed by R. B. Hoffman.

* Exhibit B—(Continued)

The Mexican Consulate at Los Angeles, California, recently sent to the Embassy copies of certain briefs and judicial orders, the study of which has led the Embassy to modify certain prior conclusions but, on the whole, has confirmed my Government's viewpoint that, in the case under reference, a procedure contrary to the principles of International Law is being followed.

The Embassy had construed the Court's "Order and Decree Denying Sovereign Immunity, etc.," dated February 13, 1942, as a denial of my Government's plea of immunity, based on the finding that its title to the vessel had not been established. This premise had induced the Embassy to conclude that the American judicial authority under reference had incurred in error when it refused to acknowledge that the Mexican Government's title to the vessel had been established *prima facie* by means of the evidence filed in the Special Appearance.

This conclusion has been modified in view of the fact that the copies of the judicial proceedings, to which reference has been made, seem to indicate that libelant in the instant [108] case has expressly accepted that the "Baja California" is owned by the Mexican Government. In this connection, I take pleasure in remitting to Your Excellency a copy of "Libelant's Brief in Opposition, etc.," the chapter of this pleading, entitled "Analysis of the Note of the Honorable F. Castillo Najera" (pages 33-35), containing the following statement which I would like to bring to Your Excellency's attention: "Para-

Exhibit B—(Continued)

graph (4) correctly states the fact that these vessels (the 'Baja California' and the 'Campeche') belong to the Mexican Government."

The Embassy would appreciate if the Department of State would return this copy after having examined it and has the honor to send to the Department, for its files, triplicate copies of the chapter under reference.

It is my Government's contention that, upon acceptance by the libelant of my Government's ownership of the vessel "Baja California," all in rem proceedings should have ended. Their continuation by the United States District Court was tantamount to placing my Government in the position of a party defendant in a legal action. In this respect, my Government contends that it is a rule of International Law—established beyond dispute—that the courts of a country are not empowered to implead a foreign sovereign.

The basis of this contention rests not only upon principles of International Law but also on the fact that the Courts of Your Excellency's Government have established that it is outside their powers to execute their judgments on property of friendly foreign sovereign nations. At least on one occasion, this thesis has been carried to the extreme of sustaining that it obtains [109] even when the foreign nation has submitted itself to the jurisdiction of Your Excellency's Government's judicial authorities.

Exhibit B—(Continued)

In this connection, it is the understanding of my Government that in the case of *Dexter & Carpenter*, the Government of Sweden had submitted to the jurisdiction of the Courts of the United States of America. Nevertheless, the United States Circuit Court of Appeals held that the judgment against the Swedish Government could not be executed upon the property which had been attached because Sweden's title thereto had been established (43 F (2nd) 705, 708).

It is my Government's understanding that the judicial faculty of attachment is, in essence, identical to the faculty exercised by the Courts upon executing a judgment on attached property. Therefore, the statement contained herein that the District Court in the present case should have released the attached vessel as soon as the libelant had accepted that the title thereto is vested in the Mexican Government, would appear to be substantiated also by American jurisprudence.

Furthermore, consideration should be given the fact that, independently of the question of similiarity between the faculty of attachment and that of execution, the procedure being followed by the District Court is futile, for if American jurisprudence has accepted the rule of International Law that the property of a friendly sovereign nation is immune to execution, the attachment of the steamship "*Baja California*" can in no manner be considered as an effective guaranty of libelant's rights.

Therefore, the Embassy considers that this attach-

Exhibit B—(Continued)

ment (a) violates International Law, (b) is contrary to an estab- [110] lished practice of American Law, and (c) affords libelant no effective guaranty of execution.

In the premises, I have the honor to request Your Excellency's good offices with the view of obtaining the immediate release of the vessel "Baja California" from the judicial proceedings instituted by R. B. Hoffman at the United States District Court for the Southern District of California, Central Division, at Los Angeles, with the understanding that, if contrary to my Government's contention that under International Law execution of a judgment against a vessel belonging to a foreign friendly sovereign may not be had, the Courts decide that execution may be had against the vessel, the Government of Mexico will meet any liability which may be declared directly against it.

My Government binds itself as above indicated only for the purpose of facilitating Your Excellency's intervention which I have the honor to request. Therefore, its action shall not be considered as establishing a precedent for cases of this nature which may occur in the future, nor as accepting the legality of the proceedings which the judicial authorities of the United States of America have followed against the above-mentioned vessel "Baja California." This action, moreover, shall not be construed as the relinquishment of any legal remedy which may assist my Government in accordance with International Law or with United States statutory law or

Exhibit B—(Continued)

jurisprudence. Therefore, my Government will be free to claim, through the customary diplomatic channels, redress of any and all denials of justice which may have been committed, or which in the future may be committed in this case by Your Excellency's Government's Courts, and to avail itself of each and every legal remedy which may be at its disposal according to American Law. [111]

There is another aspect of this case which I would like to bring to Your Excellency's attention. The facts of the case which have caused the litigation—collision of the Mexican steamship "Campeche" and the "Lottie Carson"—occurred in Mexican national waters. This does not appear to have been contested. Nevertheless, the libelant has chosen, as his forum, a Court which is at a considerable distance from the place in which the facts giving rise to litigation occurred. Such action not only constitutes a violation of the internationally accepted *lex regit actum* but also has made it impossible for my Government's representatives at the United States District Court to make a proper presentation of the facts involved nor an adequate defense of its rights and immunities.

Mexican law, supposedly, will have to be proven, and depositions of witnesses residing at a great distance from the Court will have to be presented. This seems all the more irregular upon considering that libelant had free and facile access to the only forum invested with jurisdictional authority and with the necessary facilities at its command to conduct a

Exhibit B—(Continued)

proper and regular trial -the Mexican District Court nearest to the place in which the collision occurred.

In this connection, I have been informed that on March 26, 1942, a period which have been set by the United States District Court for the presentation of evidence relative to important factors of the case, will terminate. My Government would here like to express that the presentation of such evidence and the allegations which its representatives before the Court may make, shall not be construed as a renouncement to any of its rights nor as a waiver to the immunities pertaining to it as a sovereign.

[112]

My Government, likewise, has instructed me to request Your Excellency's intercession with the view of obtaining an extension of the period terminating on March 26, 1942. A continuance of this period is indispensable if my Government is to be accorded an adequate opportunity to defend its rights and to make a full showing of the facts involved.

I have the honor to express my Government's deep appreciation of Your Excellency's assistance in all of these matters which are viewed with utmost concern by the Government of Mexico.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

(signed)

F. CASTILLO NAJERA

Ambassador. [113]

Exhibit B—(Continued)
Analysis of the Note of the
Honorable F. Castillo Najera

Our position, generally, with respect to this Note is that it does not contain any factual allegations which entitled the Republic of Mexico to obtain the release of the Baja California. We shall discuss all points, for the reply of the State Department to the inquiry as to the effect of the Suggestion indicates that the claim of the Mexican Government is not to be limited to that portion of the Ambassador's Note which was quoted by the Note of Assistant Secretary Berle, but rather that the claim as contained in the entire Note of the Ambassador was to be "reported" to the Court.

Paragraph (1) of the Ambassador's Note is introductory, the only factual assertion thereof which might be considered as relevant to the claim is the characterization of the Baja California as being owned by the Mexican Government. This fact has been established by the evidence and is conceded by the libellant.

Paragraph (2) contains the Ambassador's understanding of certain aspects of the collision, contrary in certain respects to the libellant's view of it, as set forth in the libel, but this entire matter of defense, as Assistant Secretary of State Berle points out, is not relevant to a consideration of the claim of immunity.

Paragraph (3) involves an incorrect analysis of or misinformation as to the libel, for the libellant has

Exhibit B—(Continued)

sued the Baja California in rem for her own negligence.

Paragraph (4) betrays the same error as to the "apparent basis of the attachment;" correctly states the fact that both [114] the Campeche and the Baja California are operated by the respondent corporation, and correctly states the fact that these vessels belong to the Mexican Government.

Paragraph (5) states an erroneous conclusion of law based on a misinterpretation of the Navermar and San Ricardo cases. The former case has been thoroughly discussed in this Brief, and it will suffice to say that the Supreme Court there denied sovereign immunity regardless of title, which was subsequently found to be in the Spanish Government, solely because the vessel was not in the actual possession and public service of the government. The other case, *Ervin v. Quintarulla* (C.C.A. 5th, 1938) 99 F. (2d) 935, granted immunity only on proof of the fact that the vessel was in the possession of the Republic of Mexico as a public vessel.

Paragraph (6) involves the same misinterpretation of the Navemar case, and the assertion that judicial proceedings, necessarily slow, will cause injury to all contending parties, overlooks the position of the libelant whose vessel has been lost, and who knows of no other method of obtaining reimbursement for his loss allegedly due to the fault of the Baja California, than judicial proceedings.

Paragraphs (7) and (8) are adequately answered

Exhibit B—(Continued)

by Assistant Secretary of State Berle and Paragraph (9) is but a concluding prayer.

In the final analysis the Note of the Ambassador admits the operation of the vessel by the respondent corporation and claims title in the Mexican Government. No one disputes these facts, and so the entire issue is one of law—Is a vessel which is not in the possession or public service of the government, though owned [115] by it, and which is, on the contrary, in the possession and under the control of a private corporation engaged in the carriage of merchandise for hire, immune from process merely because of its government ownership? The Supreme Court of the United States has held that sovereign immunity must be denied under these precise facts.

Respectfully submitted,

McCUTCHEX, OLNEY,

MANNON & GREEN ✓

Proctors for Libelant

[Endorsed]: Filed Apr. 8, 1942. [116]

[Title of District Court and Cause.]

REPLY TO THE SUGGESTION BY THE
UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
FILED ON APRIL 8, 1942

The formal offer of the Republic of Mexico contained in the "Suggestion By The United States

Attorney For The Southern District of California" filed herein on April 8, 1942, has received very careful consideration. As construed by the Honorable Sumner Welles the undertaking of the Government of Mexico is to meet any liability which may be declared directly against the steamship Baja California in these proceedings. The obligation is subject to certain conditions. The primary condition and the purpose of the proposal is that the Baja California be immediately released from attachment.

On behalf of the libelant we hereby respectfully decline the offer of the Republic of Mexico. In doing so we desire to present to the Court, to the Mexican Government, and to the interested officials of the Government of the United States certain considerations [117] which have influenced this decision.

Under the admiralty and maritime law and under the facts alleged in the libel herein, the Baja California is the offending res and is responsible for the loss of libelant's vessel, the Lottie Carson. Furthermore, the Baja California is the only legal entity which is both legally and financially responsible for the loss in this instance.

The operator of the ship, the respondent in personam herein, Cia Mexicana de Navegacion del Pacifico, S. A., is legally liable, but it does not have sufficient assets within the jurisdiction of this Court, or anywhere, as far as we know, to make restitution in any substantial amount. It has not appeared in this action, although certain assets be-

longing to it have been subjected to the jurisdiction of the Court under a writ of foreign attachment.

The Mexican Government was not libeled in personam because the libelant had no cause of action against it, and, even if such a cause of action had existed, the plea of sovereign immunity would have been available as a bar to a proceeding in personam.

At the outset, then, an action in rem against the Baja California was the only method by which the libelant could obtain jurisdiction over any person or organization or thing which was at once both legally and financially liable to make a full restitution for the loss of the Lottie Carson. It is true that the Republic of Mexico has now subjected itself to a liability "in rem" by having claimed the Baja California and answered the libel. But we do not believe that the libelant would be well advised even at present to consent to the relinquishment of custody of the vessel except upon the filing of a release bond in the usual form. Our reasons are as follows:

I.

Unless the Court retains custody of the res, or a proper substitute therefor, it has no jurisdiction to proceed with the action in rem. This principle is illustrated in [118]

Canal Steel-Works v. One Drag Line Dredge
(C. C. A. 5th, 1931) 48 F. (2d) 212 cert.
den. (1931) 284 U. S. 647; 52 S. Ct. 29, 76
L. Ed. 550

where, after the release of the res without bond, the court affirmed the dismissal of the libel on the ground that there was nothing upon which the judgment of the court could operate.

We know of no authority holding that a "binding international undertaking" of the sort proffered by the Republic of Mexico is a proper substitute for the res. That undertaking is not subject to enforcement by court process, and unless there is something upon which the decree of the court can operate, the very essence of an in rem proceeding in admiralty is lacking.

II.

The action must be carried on as a proceeding in rem against the Baja California, and must not be transformed to a suit which is in any respect a proceeding in personam against the Republic of Mexico. For if the nature of the action should be so altered, the question of sovereign immunity, now finally disposed of, would again confront the libellant. We are not sure what the nature of the action would be were the vessel released on the terms suggested by the Republic of Mexico, but it does seem clear that it would not remain an action in rem against the Baja California. And while the Mexican Government is precluded from reasserting the plea of sovereign immunity as the case now stands, one of the express reservations contained in its proposal is that it be allowed to urge that plea at any time in the future. Surely the Republic of Mexico does not expect the libellant to give up the ship and

go to trial on the merits and, if a decree in its favor is obtained, then be met with the argument that the very undertaking, in reliance on which the ship was released, is unenforceable because of the sovereign immunity of the promisor. The libelant should not be asked to relinquish the only attain- [119] ment of four months of litigation, namely, a final disposition of the question of sovereign immunity and the resulting right to retain custody of the vessel as security for his libel.

III.

The Mexican Ambassador states that, even though the libelant accepts his offer "my Government will be free to claim, through the customary diplomatic channels, redress of any and all denials of justice which may have been committed, or which in the future may be committed in this case by Your Excellency's Government's Courts". If we understand this reservation correctly the decree of this Court would not only have to survive a possible appeal to the Circuit Court of Appeals and a review by the Supreme Court of the United States, but it then might be referred to certain officials of the Government of the United States and of the Republic of Mexico and they would have power in their diplomatic conversations to redress judicial errors which did not exist in the opinion of the courts.

This encroachment on the independence of the federal judiciary would be unwise. Indeed there would be grave doubt as to the constitutionality of

the imposition of any such procedure as a condition of the libelant proceeding with his cause.

IV.

The present proceeding is not futile. We do not propose to reopen the question of sovereign immunity. That was determined by the decision of the Court on February 13, 1942, and is now the law of the case. Moreover, the Republic of Mexico has appeared generally in the action since that time.

However, we should like to dispel the Ambassador's doubt as to the libelant's right of execution on any decree in rem that may be obtained herein. The Ambassador cites the case of

Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen (C.C.A. 2d, 1930), 43 F. (2d) 705,

which held that a waiver of sovereign immunity as to a suit [120] in personam did not constitute a waiver of immunity as to execution against its property, and then expresses the view that "the procedure being followed by the District Court is futile, for if American jurisprudence has accepted the rule of International Law that the property of a friendly foreign sovereign nation is immune to execution, the attachment of the steamship 'Baja California' can in no manner be considered as an effective guaranty of libelant's rights."

The decisions of our courts have made it plain that an admiralty proceeding in rem is not analogous to the situation in the *Dexter & Carpenter* case. In at least two cases our courts have denied

immunity in proceedings in rem to property owned by the Republic of Mexico.

Long v. The Tampico

(S.D.N.Y., 1883) 16 Fed. 491

The Uxmal

(D. Mass., 1941) 40 Fed. Supp. 258

If the res can be sued, it, or a proper substitute, will be retained in the custody of the court to satisfy the decree. It is unnecessary for the *court enforce* any process against the sovereign. In considering this very question of execution in an admiralty proceeding in rem the Supreme Court stated in

The Davis (1870)

77 U. S. (10 Wall.) 15, 22, 19 L. Ed. 875, 878,

“The Marshal served his writ and obtained possession without interfering with that of any officer or agent of the Government. The United States, without any violation of the law by the Marshal, was reduced to the necessity of becoming claimant and actor in the court to assert her claim to the cotton. Under these circumstances, we think it was the duty of the court to enforce the lien of the libelants for the salvage before it restored the cotton to the custody of the officers of the Government.

“The judgment of the court is, therefore, affirmed.”

Liability in rem of government owned property is not peculiar to American jurisprudence, nor is

such liability [121] violative of any general principle of international law. The Republic of Mexico seems to have expressly recognized and extended the doctrine far beyond the facts of this case when in 1932 it signed the 1926 Brussels International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels. This convention has not been ratified by the United States, and we did not rely on it in the sovereign immunity hearing before the Honorable Paul J. McCormick. Nevertheless, the first two articles of the Convention are significant, for they represent the position which the Mexican Government has taken (apart from this case).

“Article 1. General Acceptance of Liability. Seagoing vessels owned or operated by states, the cargoes thereon laden, cargoes and passengers transported on state-owned vessels, whether the states are owners or operators of the ships or owners of the cargoes, are liable, in respect of claims relating to the operation of such ships or the carriage of such cargoes, to the same rules of liability and to the same obligations as are applicable to private vessels, cargoes and shipping enterprises.

“Art. 2. Procedure. In respect of such liabilities and obligations, the rules relating to competence (jurisdiction) of courts, litigation and procedure are the same as for commercial ships owned by private owners and for private cargoes and their owners.”

(6 Benedict on Admiralty at p. 56.)

Although unable to accept the proposal of the Mexican Government, because to do so would be to jeopardize his fundamental position, the libelant appreciates the efforts of the Honorable F. Castillo Najera and of the Honorable Sumner Welles to effect an arrangement for the immediate release of the Baja California. The libelant has been anxious from the outset to accomplish that result. Prior to the hearing on the question of sovereign immunity and again subsequent to that hearing, but before the Court's decision thereon, the libelant suggested that the vessel be released on bond without prejudice to the position of the Mexican Government on the immunity question. If the [122] Republic of Mexico is unwilling to file a release bond in the usual form at the present time, we suggest that the case be tried as soon as arrangements can be made for the attendance of witnesses.

Dated at Los Angeles, California, April 18, 1942.

McCUTCHEN, OLNEY, MAN-
NON & GREENE

Proctors for Libelant

[Endorsed]: Filed Apr. 18, 1942. [123]

Telegram
on blank of
Western Union

WA69 TWS Paid 3 Govt—WUX Washington DC
27 1102A 1942 Apr 27 AM 8 08

William Fleet Palmer

United States Attorney LOSA—

Re Hoffman Versus Mexican Vessel Baja California. Please Attend Hearing Today and Express to Court the Concern of the Government in View of the Acute Shipping Shortage Over the Tying Up of Any Vessel for the Period for Which This Vessel Has Been Tied Up and Express the Hope of the Government That a Disposition of the Matter May Be worked Out Permitting the Prompt Availability of Vessel for Shipping—

Francis M. Shea. Assistant Attorney General.

Received

Apr 27 1942

U. S. Attorney

Los Angeles, California

1961-BH. Adm.

1:30 p. m.

[Endorsed]: Filed Apr. 27, 1942. [124]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF HEARING
EXCEPTIONS OF LIBELANT, R. B.
HOFFMAN, TO ANSWER, AND TO THE
CLAIM EXECUTED ON BEHALF OF THE
REPUBLIC OF MEXICO BY THE HON.
RODOLPHO SALAZAR, FILED APRIL 4,
1942

Appearances:

McCutchen, Olney, Mannon & Greene,

By Harold A. Black, Esq.,

For Libelant.

Ben Van Tress, Esq., and

James R. Jaffray, Esq.,

For Claimant, Republic of Mexico.

William Fleet Palmer, Esq.,

United States District Attorney, and

James L. Crawford, Esq.,

Assistant United States Attorney.

Hon. Ben. Harrison, Judge Presiding. [126]

Los Angeles, California,

Monday, April 27, 1942

1:30 P. M.

The Clerk: 1961, Hoffman v. The Mexican
Steamship "Baja California".

Mr. Black: Ready, your Honor.

Mr. Van Tress: Respondents are ready.

Mr. Black: Does your Honor wish to wait until the United States Attorney is here?

The Court: He is here now.

Mr. Crawford: If the court please, is this the matter of Hoffman v. "Baja California"?

The Court: Yes.

Mr. Crawford: At this time, if your Honor please, I offer to place in the record a telegram from the Attorney General, which sort of supplements the suggestion already filed, in which it instructs us to appear and state to the court that by reason of the acute shipping shortage it is the hope of the government that a disposition may be worked out, making the vessel available for prompt shipping. And I think that is no more than the hope of counsel, if it may be worked out. May I at this time file it?

The Court: Yes. Well, gentlemen, the libellant here has filed his authorities in opposition to the suggestion of the Attorney General. No counter-authorities have been submitted. I don't know whether any can be submitted. It would seem to me that this is rather an unusual suggestion. [127] I don't know of any law that recognizes such a suggestion. However, the fact that I don't know it doesn't mean anything, but if the government has any authorities upon which to base the suggestion and upon which the court is authorized to act, I would be glad to consider it; but the present status is that it has been filed, and there is no occasion for the court to pass upon the matter one way or the other. It is simply a suggestion by the

executive department of the government. We all recognize that it is unfortunate to have any boats tied up under the present conditions, but there should be some precedent for this suggestion and some law upon which it is based. I would suggest that you transmit my statement to the Attorney General and ask for any authority upon which the court would be justified in releasing this vessel under the suggestion here.

Mr. Crawford: Very well, your Honor.

Mr. Black: If this proposal would help the situation at all, the libelant would be willing to accept a bond for the release of the vessel, in the normal form, on the understanding that we would not urge that this bond, per se, constitutes a general appearance that would waive the issue of sovereign immunity, if it has not already been waived. To make it clear, without prejudice to our position that the waiver has been affected by the filing of the answer and interrogatories, we would be willing to accept a bond at this time on the understanding that we would not urge that [128] the giving of the bond, as such, prejudiced the position of the Mexican government.

Mr. Van Tress: Well, the Republic of Mexico has had that matter submitted to them and they have declined to the posting of a bond. They feel that there is some possibility, even in the face of a stipulation, that they might be waiving some rights. Of course, we are taking our instructions from the Republic of Mexico. We have been advised that they will not post the bond.

The Court: Well, that is up to the parties.

Mr. Van Tress: Surely.

The Court: On the question of these exceptions to the answer, I feel that those matters, the question of jurisdiction and the question of waiver, and so forth, are all matters that ought to be thrashed out at the time of trial, and have one hearing on it. It isn't going to add anything to the trial one way or the other. I recognize the fact that the question of sovereign immunity has been ruled on by Judge McCormick. At the same time, when the final decision is made it is going to be my responsibility. I want to say I am in accord with Judge McCormick's ruling under the status of the case as presented to him, but I feel that this matter of exceptions should be taken up at the time of trial. There is the exception as to jurisdiction and, of course, you can never waive jurisdiction. Now, you raise some questions here as to this vessel belonging to the Government of Mexico. [129] I feel that I don't care to pass upon them at this time. I have read the authorities on both sides, and while I am inclined to feel that the exceptions are probably well taken, I would like to leave the whole thing open for trial. I think after all, the question of sovereign immunity is going to have to be passed on at the trial and, of course, the question of waiver, and so forth.

Mr. Black: May I state our position, your Honor?

The Court: Yes.

Mr. Black: There are two propositions that we submit at this time and they fall into separate categories. Our first position is that the issue of sovereign immunity was fully presented and argued in a plenary hearing before Judge McCormick and was finally decided; that his order, it is true, stated it was without prejudice to the Republic of Mexico's right to come in within 20 days after the order and make such representation as they saw fit, setting out its ownership and right to possession. That we concede to have been a safeguard of provisions giving the Republic of Mexico the right to determine both its and the Mexican corporation's position, charged with the operation of the vessel, the right of immediate possession; matters which we consider collateral to the merits of the libellant. It is a matter of no concern to us what the ultimate disposition of the vessel is. Our only dispute is the lien on the vessel, which we assert arises out of the tort, which is the foundation of the action. [130] In response to that order the Republic of Mexico saw fit to make no further showing on the immunity issue, and presumably had none to make, because the matter was most thoroughly heard, and after a matter of a great many conferences a stipulation as to the facts was arrived at, and instead of that the Republic of Mexico merely reserved its time to file a bond and claim in the statutory form set out by the general admiralty rules and its answer on the merits. Now, it is our position that that matter has heretofore been finally and definitely ruled on by the trial court. Irrespective of what-

ever the rights the Republic of Mexico may have to preserve the point of sovereign immunity on appeal, it is our position that the trial court, having ruled, has disposed of the matter and that it is not proper to tender that question again as one of the issues of fact to be determined upon the trial of the case. That stands as the doctrine of the law of the case, and as your Honor himself has stated, one district judge will not undertake to re-examine a decision made by another district judge in the same district, in that case leaving the parties, if there be error, to the normal course of appeal. So it is our position that the effect of an answer being to define the issues that are tendered for decision to the trial court, it is not proper in this case, after a full summation of the immunity issue to the district court, to again tender those same issues to the trial court to be determined upon the [131] trial of the case. There must be an end to the litigation of a particular issue, and one method chosen was the suggested method with a full and complete hearing on the subject. And we conceive to be the fact that the trial court had a full and complete hearing, even after giving the other side, the Republic of Mexico, an opportunity to make a further showing, has definitely and finally foreclosed those issues in the trial court. That is an entirely separate and distinct issue from the second ground that we urge, namely, that by filing an answer to the merits of the litigation the Republic of Mexico has waived the question of immunity.

The Court: I know; but in studying the answer

I rather came to the conclusion that counsel, out of an over abundance of precaution, set forth those matters in the answer so that there would be no question that their rights are preserved for any appeal, rather than an anticipation of a retrial of those issues. I don't know whether I am correct in that remark, but I figure that they were putting everything in their answer to protect their record, as far as possible. Whether or not they have an appeal directly from this subject, after a certain length of time after the court's decision, they are trying to preserve their record on it.

Mr. Black: On that question, our position is that the record is preserved by this district court sustaining the exception to the matter excepted to, which could be the only [132] consistent ruling the court could make——

The Court: We are not always consistent, Mr. Black.

Mr. Black: Not only consistency, as far as the decision on the merits is concerned, but we submit no other result is possible.

The Court: I feel, Mr. Black, that we should arrange for an early trial in this case and not keep the boat tied up.

Mr. Black: We will arrange it as early as possible.

The Court: Two months is too long a time to have this boat tied up.

Mr. Black: If there is any possibility of getting the witnesses ashore we will be glad to do so, but

there are two very important witnesses. One is the first mate aboard at the time, and the only officer that was aboard. We feel we should not do without his testimony.

The Court: I think the court should recognize the present emergency to the extent of disposing of these cases with some degree of expediency.

Mr. Black: We fully agree, your Honor, and we have no intention of attempting to wait out the term of the court, or anything of the sort. Just as soon as we can assure ourselves of the testimony being available we will notify your Honor and the other side, and be prepared to go to trial at the earliest possible date consistent with the presentation of the facts.

Mr. Van Tress. If we knew what the facts were that would [133] be given by those two witnesses we might be willing to stipulate that if they were here they would so testify.

Mr. Black: It is possible such an arrangement can be worked out.

Mr. Van Tress: We talked to Mexico City since this morning. We have been advised that our witnesses can be brought here within 10 days from Mexico, as far as the respondents' case is concerned. I would be very happy to get together with counsel and see if we can stipulate to those witnesses' testimony.

Mr. Black: It may be that something of the sort will be possible. I might advise your Honor that we brought the libellant up from Mazatlan and we expect to take his deposition tomorrow. If

there is any possibility of a trial within 10 days we might decide to hold him for the actual trial, so that your Honor will have the benefit of hearing the testimony spoken.

The Court: How long will it take to try this case?

Mr. Black: It somewhat depends on whether the usual practice will be followed with a hearing on the merits first, with reference on the damages. If we go into the damage issue——

The Court: I think the usual practice should be followed, as far as a reference on the matter of damages.

Mr. Black: On the merits I should imagine it wouldn't take more than two days at the outside.

[134]

Mr. Van Tress: There will be about six or eight witnesses here. It shouldn't take over three days at the most.

Mr. Black: Perhaps three days.

The Court: I can give you some trial time now, but it might be so close you wouldn't want it. I think I have some time the second week in May.

Mr. Black: Well, subject to the possibility of working out a stipulation on the two witnesses I mentioned——

The Court: Well, you gentlemen confer and let me know tomorrow.

Mr. Van Tress: All right, your Honor.

The Court: I am going to continue the hearing on the exceptions to the time of trial. I am going to take it all up at one time.

Mr. Van Tress: Will counsel and I confer on the testimony of those two witnesses, and call you tomorrow?

Mr. Black: Yes. I think the best plan would be to let me call you, counsel. I haven't the material here of what the testimony would be, and I would have to go over it generally and let you know what these witnesses know about the case.

Mr. Van Tress: All right. Thank you, your Honor.

The Court: You can advise the Attorney General that his telegram has been duly received, but it wasn't accompanied by any authorities to support it; and under our rules here a [135] request for anything must be supported by points and authorities.

Mr. Crawford: We have the points, but no authorities.

The Court: You haven't the points.

Mr. Crawford: I will advise the Attorney General, because I doubt very much if there is any authority to support it.

Mr. Black: I might say that we did not expect to tie up this vessel. We expected a bond would be forthcoming.

[Endorsed]: Filed June 5, 1943. [136]

[Title of District Court and Cause.]

MEMORANDUM OPINION

Appearances:

**McCUTCHEN, OLNEY, MANNON &
GREENE, ESQS.**

By **HAROLD A. BLACK, ESQ.,** and
RICHARD H. PETERSON, ESQ.

Roosevelt Building,
Los Angeles, California,
Proctors for Libellant.

BEN VAN TRESS, ESQ., and
JAMES R. JAFFRAY, ESQ.

311 South Spring Street,
Los Angeles, California,

Proctors for Respondents and Claimant.

This is an action in admiralty, wherein the Mexican Steamship "Baja California" was libeled for the loss of the schooner "Lottie Carson" as the result of a collision occurring in Mazatlan Harbor, October 19, 1941.

The facts, except in certain particulars which will hereinafter be discussed in some detail, are not in serious dispute. On the 19th day of October, 1941, the "Lottie Carson", a conventional three masted schooner, which had been refitted as a mother ship for shark fishing was anchored in Mazatlan Harbor, under the direction of the Port Pilot. The "Lottie Carson" was equipped with auxiliary power consisting of [137] two fifty-five horsepower heavy

duty gasoline engines, but which were out of commission at the time of the collision, which fact was known by the port officials.

At 11:00 o'clock A. M., the captain and libellant herein was advised that a ship in the harbor was on fire and immediately proceeded to the "Lottie Carson" and there saw the steamer "Campeche" on fire. The "Campeche" was located about 1500 feet from the "Lottie Carson", close to the center of the entrance to the narrow Mazatlan Harbor. The wind was such that there appeared to be little danger to the "Lottie Carson" from fire. Thereafter, the "Baja California" tied into the stern of the "Campeche" with a long tow line and attempted to beach the "Campeche". In doing so the "Baja California" attempted to tow the "Campeche" on the portside of the "Lottie Carson". In this attempt she found herself in danger of running aground and in order to protect herself cut the tow line and left the "Campeche" adrift close to the "Lottie Carson", and in about three minutes the stern of the "Campeche" collided with the "Lottie Carson", resulting in her total loss.

At the time, and immediately prior thereto, the harbor tug "Tepic" was attempting to move the "Lottie Carson" from the danger zone. The danger was so imminent that the "Lottie Carson" did not have time to raise her anchor but was letting out her anchor chain and the "Tepic" was attempting to tow the "Lottie Carson" away from the approaching "Campeche" but was unable to do so in time to avoid the collision.

Respondents place their defense upon the assertion that the "Lottie Carson" had due warning of approaching danger and in failing to take advantage of this warning must bear the consequences. The evidence in this respect is very conflicting but it is apparent to me that the "Lottie Carson" did not have sufficient notice of danger of a collision, in order to avoid the same. Captain Hoffman of the "Lottie Carson" sensed only the danger of fire and had his crew and additional help prepare to meet such an emergency but did not have time to [128] change the position of his boat after he learned of the contemplated maneuvers of the "Campeche". I further find that the captain of the port gave no orders for the movement of the "Lottie Carson" in time to avoid the collision. The activity about the "Campeche" was not indicative that she was to be beached in such a narrow harbor and only twenty minutes elapsed between the commencement of the towing and the collision, and only three minutes elapsed between the cutting of the tow rope and the collision. The evidence clearly discloses that the beaching of the "Campeche" was not carried out as contemplated and as a result the "Lottie Carson" was lost and the sole responsibility therefor must rest upon the "Baja California".

The contention of the respondents is to the effect that certain maneuvers were contemplated and the libellant had time to get out of the way and should have done so, and having failed to do so must bear the full consequence of the negligence of the respondents. Even if the "Lottie Carson" had time to

get out of the way and failed to do so, such facts would not justify respondents in proceeding to destroy the "Lottie Carson". When the "Baja California" commenced the towing of the "Campeche", the "Lottie Carson" was still in place and the potential hazards to the "Lottie Carson" were fully known to the "Baja California" as amplified by the testimony of Jorge Avilla, captain of the "Campeche", who testified as follows:

Q. By the Court: Captain, referring to Exhibit 15 in your drawing of yesterday: Now, when the "Baja California" got ahold of your boat and started to tow it for the sand bank, at that time did you anticipate that you would collide with the "Lottie Carson"?

A. Yes; I thought of the possibility that we might strike the "Lottie Carson".

Q. It was not your plan to strike the "Lottie Carson", was it? [139]

A. Naturally not.

Q. And if the maneuvers, as you had planned them, had worked out you would not have collided with the "Lottie Carson"?

A. No; because the "Lottie Carson" would have been moved away from there.

Q. I know, but when the "Baja California" was towing your ship you expected to clear the "Lottie Carson", didn't you?

A. Yes, of course. If it did not move away from there we would have to find a way to go around it.

Q. And the reason that your boat collided with the "Lottie Carson" was due to the fact that the "Baja California" cut the tow rope and permitted your boat to drift into it?

A. That is one of the reasons of the causes, and also due to the current.

At the inception of the proceedings the claimant, Republic of Mexico, filed a suggestion of sovereign immunity and thereafter the United States Attorney filed an additional suggestion. These suggestions came on for hearing before Judge Paul J. McCormick, Senior Judge of this district, and after due consideration he concluded that this court should retain jurisdiction under the authority of the *Navemar*, 303 U. S. 68. Thereafter, claimant filed its answer and among other things set forth the defense of sovereign immunity but introduced no additional evidence nor attempted to show any extraordinary circumstances why the subject of sovereign immunity should be reviewed, at the same time asking this court to again pass upon the issue of sovereign immunity. I consider the ruling heretofore made on this issue as the law of the case (*Commercial Union of America v. Anglo-South American Bank*, 10 F. 2d, 937), and if the claimant was dissatisfied with the ruling of [140] Judge McCormick, it would have had the issue finally determined by a review court as was done in *The Katingo Hadjipatera*, 119 F. 2d 1022.

Claimant further contends that the laws of Mexico should control this litigation and at the trial

offered in evidence copies of the (1) purported laws of Mexico covering the maritime police authority over the Port of Mazatlan; (2) that actions cannot be maintained unless report is made within twenty-four hours to the captain of the port; and (3) that no presumption arises by reason of a collision of a moving vessel with one at anchor.

The claimant did not plead the foreign laws above mentioned and therefore the same were not admissible (21 R.C.L. 438-9) but even if they had been admissible under the facts of this case, the result would be the same. The libelant contends and his testimony supports his claim that he, at all times, complied with the orders of the captain of the port. Libelant further testified that he made a report to the captain of the port within twenty-four hours and there is no substantial evidence to the contrary. Even if the procedural law of Mexico controlled this court, the evidence clearly discloses that the "Baja California" was solely at fault.

Libelant is entitled to prevail and this matter is referred to David B. Head, as Special Master, to ascertain the amount of damages due libelant and report such findings to this court.

Dated: Los Angeles, California, June 29, 1942.

BEN HARRISON,

Judge.

[Endorsed]: Filed Jun. 29, 1942. [141]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on regularly for hearing on May 6, 1942, before the Honorable Ben Harrison, United States District Judge. Messrs. McCutchen, Olm y, Mannon & Greene by Harold A. Black, Esq. and Richard H. Peterson, Esq. appeared as proctors for libelant and Ben Van Tress, Esq., and James R. Jaffray, Esq. appeared as proctors for the respondent vessel Baja California and claimant Republic of Mexico. A written stipulation that the trial might be had on the above date, and waiving notice of trial, was filed by Herbert R. Lande, Esq., proctor for certain intervening [142] libelants. The trial was had on May 6, 1942, continued to and resumed on May 13, 1942, and concluded on May 14, 1942. It was stipulated and agreed that all issues relating to the amount of damages would be reserved until after a decision on all other issues, and that a reference should be had for the purpose of determining and reporting the amount of damages to be awarded in the event of a decree in favor of libelant. The cause was duly heard upon the pleadings and upon evidence, both oral and documentary, and upon certain oral and written stipulations herein. The cause was thereupon duly submitted upon written briefs which the Court has fully considered, together with the said pleadings and proof, and now being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court finds that:

I.

At the time of filing the libel herein and at all times herein mentioned, libelant, R. B. Hoffman, was the master and owner of the gas screw schooner Lottie Carson. Libelant brings this action in his own behalf and in behalf of California Packing Corporation, mortgagee of the said vessel and bailor of certain personal property on said vessel at the time of said collision, and on behalf of underwriters, whose rights arise by subrogation on account of payment of losses on loan receipts.

II.

The Lottie Carson was a conventional three-masted wooden lumber schooner, 132' long between perpendiculars, and with a 32' beam. She was equipped with auxiliary power consisting of two 55 h.p. heavy duty gas engines. She was fitted out as a [143] mother ship for use in the shark fishing business and had just been rebuilt and refitted shortly before the collision hereinafter mentioned.

III.

The Baja California is a steel merchant steamship of approximately 579 net tons. At all times herein mentioned she was and is now owned by claimant Republic of Mexico. At the time of the collision hereinafter referred to and at the time of filing the libel and the service of the monition here-

in, she was in the possession, operation and control of respondent *Compania Mexicana de Navegacion del Pacifico, S. de R. L.* Said *Compania Mexicana de Navegacion del Pacifico, S. de R. L.* is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico. At the time of the service of the monition herein, said respondent vessel was within the Southern District of California and the jurisdiction of this Court.

IV.

The *Lottie Carson* arrived at the port of Mazatlan, Sinaloa, Mexico, on October 17, 1941. She anchored in that harbor under the direction of the Port Pilot of said port of Mazatlan at a point opposite the lowland between Azada Island and Creston Island, approximately two-thirds of the distance from the easterly side and one-third from the westerly side of Mazatlan Harbor which was 3000 feet wide. After arrival at her anchorage the cylinder heads were removed from the *Lottie Carson's* engines and were taken ashore to serve as models for the casting of spare heads. Without the cylinder heads the *Lottie Carson* was unable to use her main engine and could not move under her own power. This fact was known to the Mexican port officials. The said cylinder [144] heads were still ashore on October 19, 1941, and at all times until after the collision hereinafter mentioned.

V.

At about 11:00 A. M. on October 19, 1941, libelant was notified that a ship was on fire in the harbor. He was then at his hotel in the City of Mazatlan. He proceeded immediately to the Lottie Carson. It was then discovered that the Mexican steamer Campeche was on fire. The Campeche was anchored about 1500 feet to the southeasterly of the Lottie Carson, close to the center of the entrance to Mazatlan Harbor. The wind was then blowing from a northwesterly direction—that is, from the Lottie Carson and toward the Campeche, and there appeared to be no immediate danger to the Lottie Carson from fire. Nevertheless, libelant had taken some seamen from shore in addition to his regular crew to assist in case of emergency and when he arrived on board the Lottie Carson, he found that the first mate of the Lottie Carson, who had been in charge of the vessel in his absence, had also taken aboard some additional seamen. The said mate had caused the fire pumps to be manned and had wet down the vessel's decks and rigging with the use of fire hoses and had tested the winch engine as precautionary measures to protect against the possible fire hazard.

VI.

A considerable time after libelant arrived on board the Lottie Carson, and in the early afternoon of said October 19, 1941, some men in a small boat partially cut the anchor chain of the Campeche. The fire on the Campeche was on the forward part, making it impossible for the Campeche to raise her

anchor. Thereafter the respondent vessel *Baja California* moved from a position down wind from the *Campeche* to a position in the vicinity of the [145] *Campeche*. The harbor tug *Tepic* then took a line from the stern of the *Campeche* and pulled the stern of said *Campeche* toward the northwest. After that, the *Baja California* moved over and took this line from the *Tepic* and commenced an attempt to beach the *Campeche*.

VII.

In order to move the *Campeche* it was first necessary to free her from her anchor chain. The *Baja California* pulled on the towline from the *Campeche*'s stern in an attempt to break the *Campeche* loose, but the towline parted. A new line was then made fast to the stern of the *Campeche* and the *Baja California* renewed the effort to tow the *Campeche*. This towline was between 300 and 600 feet long. Instead of pulling to the southward, toward the open sea, the *Baja California* pulled in a westerly or northwesterly direction. The resistance of the *Campeche* and her anchor put a severe strain on the towing line. Then the *Campeche*'s anchor chain parted and the *Campeche* came with a surge to the westward, almost striking the rocks of Creston Island. The *Baja California*, seeing that both vessels were in imminent danger, turned sharply to the north, jerking the *Campeche* after her. Soon the *Baja California* found herself in the shallow water at the northerly end of the harbor. To avoid beaching herself, the *Baja California* hauled abruptly to the east. At that time the *Campeche* was about

opposite, to the west of and close to the port side of, the Lottie Carson. The stern of the Campeche was jerked in an easterly direction and then the Baja California cut the towline and left the Campeche adrift. Due to the momentum given the Campeche by the towing of the Baja California, and also by the wind and current, the Campeche drifted toward the Lottie Carson and her stern struck the port side of the Lottie Carson, [146] at or about two o'clock in the afternoon of October 19, 1941.

VIII.

When libelant saw the Baja California towing the Campeche in a northerly direction so that she would necessarily pass close to and to the windward of his vessel, he immediately made preparations to raise his anchor. Before this could be accomplished, the Campeche was cut adrift and under the impetus of the pull given her by the Baja California and the force of the wind and current, started moving down rapidly on to the Lottie Carson. Libelant did not have time either to continue his operation of raising the anchor or to stop the winch and unshackle or cut the chain. Libelant's only chance of avoiding or lessening the force of the collision was to have the tug Tepic (which in the meantime had taken a line from the Lottie Carson's starboard side) pull the Lottie Carson in the opposite or easterly direction while the Lottie Carson let out her anchor cable as fast as possible. Although about 600 feet of cable were paid out, it was not possible for the Lottie Carson to avoid the collision.

IX.

The Rudder of the *Campeche* cut a large hole in the *Lottie Carson* and the *Lottie Carson* filled with water. She eventually sank in the shallow water in which she was beached. Nothing could be done to save her, although some personal property on board the vessel was removed. As a result of the collision the *Lottie Carson* become a total loss.

X.

The *Baja California* and those in charge of her were negligent in the following particulars:

1. In attempting to take the *Campeche* on so long a hawser in a maneuver to perform which successfully [147] it was necessary to put the *Campeche* ashore and escape going aground herself.

2. In towing the *Campeche* toward Creston Island instead of towing toward the open sea in the operation of breaking the *Campeche* loose from her anchor chain.

3. In towing the *Campeche* to the windward of and in close proximity to the *Lottie Carson*.

4. In cutting the towline to the *Campeche* at the precise time and place most likely to damage or destroy the *Lottie Carson*.

5. In attempting the maneuver at all without first definitely ascertaining that the *Lottie Carson* had been removed to a place of safety.

XI.

The collision and total loss of the *Lottie Carson* were solely due to the fault of the *Baja Califor-*

nia and those in charge of her in the foregoing particulars.

XII.

The Lottie Carson did not have any notice of danger of a collision until after it was impossible for that vessel to avoid the same. The activity about the Campeche did not reasonably indicate that said vessel was going to be beached in the vicinity of the Lottie Carson. Only approximately twenty minutes elapsed between the commencement of the towing of the Campeche by the Baja California and the collision, and only three minutes elapsed between the cutting of the towline by the Baja California and the collision. The Port Captain gave no orders for the movement of the Lottie Carson in time to avoid the collision.

XIII.

The Lottie Carson was not in anywise at fault as respects [148] the collision. As soon as the Lottie Carson had any reason to believe that the Baja California intended to tow the Campeche in the vicinity of the Lottie Carson, the Lottie Carson did everything that could reasonably be done to avoid or minimize the collision. The Lottie Carson could not move without assistance. Under the circumstances then prevailing it would have been impossible for her to have moved under sail alone and her engines were not in working condition. The only assistance readily available was that given by the tug Tepic which was used as promptly and effectively as possible.

XIV.

The alleged laws of the Republic of Mexico offered in evidence by claimant were not pleaded nor were they sufficiently proved. The said laws were, therefore, not admissible in evidence. But even if said laws had been pleaded and properly proved, and if the procedural laws of Mexico were controlling in this action, there would be no difference in the decision. The said alleged laws were all complied with by the libelant. Specifically, libelant at all times herein mentioned complied with the orders of the Captain of the Port, the Port Pilot and other Mexican officials having authority in the premises at the port of Mazatlan. Libelant made a report or protest concerning the collision to the Captain of the Port at Mazatlan within twenty-four hours after the collision. Assuming that under the law of Mexico no presumption of fault arises by reason of a collision between a moving vessel and one at anchor, and even assuming further that such law, if established, would be controlling in this action, the evidence in this case, apart altogether from presumptions, affirmatively shows that the Baja California was solely at fault. [149]

CONCLUSIONS OF LAW

And as Conclusions of Law, the Court finds that:

I.

The decision of Honorable Paul J. McCormick that claimant was not entitled to have the vessel released on a plea of sovereign immunity, made at the inception of these proceedings after due consideration, and after a full hearing on the Sugges-

tions of the Republic of Mexico and the United States Attorney, evidence, oral and documentary, and written briefs, is the "law of the case". Claimant has set forth no additional evidence and has shown no extraordinary circumstances justifying this Court in again passing upon the issue of sovereign immunity. If claimant was dissatisfied with the prior ruling of Judge McCormick, it could have had the issue finally determined on review by an Appellate Court.

II.

Libelant is entitled to recover all the damages sustained by him, individually and as bailee and subrogee as the result of the collision aforesaid with interest and costs.

Let an interlocutory decree be entered accordingly with an order of reference to Allan F. Bullard, Esq., as Special Master, to ascertain the amount of damages due libelant and to report such findings to this Court, within forty-five (45) days.

Dated July 31, 1942.

BEN HARRISON,

United States District Judge.

Receipt of a copy of the foregoing admitted this 31st day of July, 1942, at 2:30 o'clock, P. M.

BEN VAN TRESS,

JAMES R. JAFFRAY,

Proctors for Respondent
Steamship Baja California
and Claimant Republic of
Mexico.

[Title of District Court and Cause.]

INTERLOCUTORY DECREE AND ORDER OF REFERENCE

By reason of the law and the Findings of Fact on file herein.

It Is Hereby Ordered, Adjudged and Decreed:

I.

That the collision between the schooner Lottie Carson and the steamer Campeche in tow of the steamer Baja California which occurred in the harbor of Mazatlan, Sinaloa, Mexico, October 19, 1941, referred to in the pleadings and the Findings of Fact and Conclusions of Law herein and the total loss of the Lottie [151] Carson and all losses and damages resulting therefrom were caused through the sole fault of the steamer Baja California and of those in charge of her navigation.

II.

That libelant Robert B. Hoffman as owner of the American gas screw schooner Lottie Carson and as bailee of certain personal property and as subrogee of interested underwriters, do have and recover of and from the Mexican steamer Baja California, her engines, tackle, apparel and furniture, and from the Republic of Mexico, claimant of said steamship Baja California, the full amount of the losses and damage sustained by the said Robert B. Hoffman as such owner, bailee and subrogee by reason of the aforesaid collision, together with interest and costs.

III.

That this cause be and it is hereby referred to Allan F. Bullard, Esq., as special master, to ascertain the damages sustained by libelant in his own behalf and as bailee and subrogee aforesaid and to make findings and report his conclusions thereon to this Court with all convenient speed.

Dated this 31 day of July, 1942.

BEN HARRISON,

United States District Judge.

[152]

Approved as to form as provided in Rule 26, old Rule 44, new Rule 8.

BEN VAN TRESS,

JAMES R. JAFFRAY,

Proctors for Respondent
Steamship Baja California
and Claimant Republic of
Mexico.

Receipt of a copy of the foregoing admitted this
..... day of July, 1942, at o'clock, M.

BEN VAN TRESS,

JAMES R. JAFFRAY,

Proctors for Respondent
Steamship Baja California
and Claimant Republic of
Mexico.

Interlocutory Decree entered Jul. 31, 1942. Docketed Jul. 31, 1942. Book Min. = 28. Page 735. Edmund L. Smith, Clerk. Murray E. Wire, Deputy.

[Endorsed]: Filed Jul. 31, 1942. [153]

In the District Court of the United States, Southern District of California, Central Division.

In Admiralty

No. 1961-BH

R. B. HOFFMAN,

Libelant,

vs.

The Mexican Steamship BAJA CALIFORNIA,
etc., and CIA MEXICANA de NAVEGACION
del PACIFICO, S. A.,

Respondents,

REPUBLIC OF MEXICO,

Claimant.

FINAL DECREE

Findings of Fact and Conclusions of Law were made and filed herein on July 31, 1942, on which date this Court also made and filed an interlocutory decree whereby it was ordered that Libelant Robert B. Hoffman, as owner of the American gas-screw schooner Lottie Carson, as bailee of certain personal property, and as subrogee of interested underwriters, do have and recover of and from the Mexican steamer Baja California, her engines, tackle, apparel and furniture, the full amount of the losses and damage sustained by the said Robert B. Hoffman as such owner, bailee and subrogee by reason of the collision between the schooner Lottie Carson and the steamer Campeche in tow of the

steamer [154] Baja California, which occurred in the harbor of Mazatlan, Sinaloa, Mexico, October 19, 1941, together with interest and costs. In said interlocutory decree it was further provided that this cause be referred to Allan F. Bullard, Esq., as Special Master, to ascertain the damages sustained by Libelant in his own behalf and as bailee and subrogee aforesaid, and to make findings and report his conclusions thereon to this Court.

Said Allan F. Bullard has duly filed his report herein on November 30, 1942, by which there is reported due to Libelant the sum of \$73,566.77, with interest thereon at 7% per annum from October 19, 1941 to the date hereof, also the sum of \$2112.70, with interest thereon at 7% per annum from January 1, 1942 to the date hereof, amounting in all to \$81,758.33.

Said report has been read by the Court and due notice of the filing thereof has been given to proctors for Claimant herein and respondent Baja California and the Court is fully advised in the premises.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the said report of said Allan F. Bullard, Esq., as Special Master, be and the same is hereby in all respects confirmed.

2. That said Libelant Robert B. Hoffman, in his own behalf and as such bailee and subrogee, do have and recover in this action against the said steamer Baja California, her engines, boats, boilers, tackle, apparel and furniture, the said sum of \$81,758.33, with interest thereon at 7% per annum from

the date hereof until paid, together with costs to be taxed, in the amount of \$4631.79, with like interest [155] thereon from the date hereof until paid; and the said Baja California, her engines, boats, boilers, tackle, apparel and furniture be condemned therefor.

3. That the Clerk of this Court issue a writ of Venditioni Exponas to the Marshal of this district for the sale of said Baja California, her engines, boats, boilers, tackle, apparel and furniture, on board or alongside of said vessel, the said Marshal giving 6 days' notice of sale pursuant to law.

4. That out of the proceeds of the sale of the said Baja California, her engines, boats, boilers, tackle, apparel and furniture, when paid into the registry of this Court, the Clerk of this Court pay to proctors for said Libelant the said amount reported due, to wit, \$81,758.33, with interest thereon at 7% per annum from the date hereof until paid, together with \$4631.79, Libelant's taxed costs, with like interest thereon from the date hereof until paid.

5. That the fee of said Allan F. Bullard, Esq., Special Master, is hereby fixed in the sum of \$500.00 said sum to be paid out of the proceeds of the sale in the registry of this Court; or if paid by either party, the party paying said fee to said Special Master shall be reimbursed out of said proceeds of said sale.

6. That the Clerk, after deducting the taxed costs of the officers of Court, distribute the proceeds in satisfaction of this decree to the parties en-

titled thereto according to law and the further order of this Court.

Dated: Dec. 12, 1942.

BEN HARRISON,

United States District Judge.

Judgment entered Dec. 12, 1942. Docketed Dec. 12, 1942. Book Min. #31, Page 61. Edmund L. Smith, Clerk. By Murray E. Wire, Deputy.

[Endorsed]: Filed Dec. 12, 1942. [156]

[Title of District Court and Cause.]

**PETITION FOR ALLOWANCE OF APPEAL
BY THE REPUBLIC OF MEXICO, AS
CLAIMANT, AND THE STEAMSHIP BAJA
CALIFORNIA BY SAID REPUBLIC OF
MEXICO, AS OWNER**

The petition of the Republic of Mexico as claimant and of the Steamship Baja California by said claimant as owner, respectfully shows as follows:

1. That on or about December 15, 1941, the libellant herein filed his libel in the District Court of the United States, Southern District of California, Central Division, against the Mexican Steamship Baja California, etc., and Cia Mexicana de Navegacion del Pacifico, S. A., in a cause for collision, civil and maritime, to recover about \$67,000.00, for alleged damages to the schooner Lottie Carson, lost cargo of the said schooner and loss of the personal effects of

its master, as by reference to said libel will more fully appear. [157] |

II.

That on or about January . . . , 1942, the claimant, Republic of Mexico, filed herein its suggestion of immunity for said vessel on the ground of sovereign ownership thereof in said Republic of Mexico, and upon bringing the said suggestion to the attention of the above court, release of the vessel from the custody of the Marshall of said court was refused on February 13, 1942, it being then in such custody under proceedings in this libel, and thereafter on or about March . . . , 1942, said claimant renewed such suggestion of immunity, which was denied further consideration by the court.

III.

That or or about March . . . , 1942, answer to such libel was filed by said claimant and for said vessel as owner thereof.

IV.

That such proceedings were thereafter had in this case on May 6, 1942, and continued to May 13, 14, and 15, this cause coming on for trial before Honorable Ben Harrison at the court room of said court in the United States Post Office Building, at Los Angeles, California, and at the close of said trial the court rendered its decision, holding the Steamship Baja California in fault for the collision and damage set forth in the libel, and on July 31, 1942 entered its interlocutory decree and by its order referred this case to Allan F. Bullard, as special master to take

and report the evidence of the amount of damages incurred. On November 3, 1942, said special master filed his report herein, and objections were filed thereto by claimant. On December 12, 1942, the court overruled said objections, approved said report and on December 12, 1942, a final decree was made and entered in this case whereby it was ordered, adjudged and decreed that libellant recover of and from said Steamship Baja California, the sum of \$81,700.05 damages with interest, and costs in the sum of \$4,625.29, and a Writ of Enforcement by sale of said vessel was ordered and thereafter issued. [158]

V.

That this claimant, Republic of Mexico, is advised and believes that said final decree and the said decision whereon it is rendered are erroneous, in that said decision and said final decree did not decree that said libel herein be dismissed as to this claimant and said vessel, with costs.

Your petitioner therefore prays that it may be allowed to appeal from said final decree to the next term of the Circuit Court of Appeals for the Ninth Circuit, and that a transcript of record of the proceedings and papers upon which said decree was made, duly authenticated, may be sent accordingly to said Circuit Court of Appeals, and that the usual citation may issue in order that the said decree may be fully reviewed and may be reversed, by the said Circuit Court of Appeals, in so far as it orders and

decrees the several matters alleged as error in the assignments of error herewith filed.

**BEN VAN TRESS and
JAMES R. JAFFRAY
JAMES R. JAFFRAY**
Proctors for Petitioner

United States of America,
States of California,
County of Los Angeles—ss.

Manuel Aguilar, being duly sworn, deposes and says, that he is the Consul at Los Angeles for the Republic of Mexico, the petitioner above named, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief; and that the said appeal is not taken for the purpose of delay, but because the petitioner believes that injustice has been done.

[Seal] **MANUEL AGUILAR**

Sworn to before me this 11th day of January, 1943.

[Seal] **BEN VAN TRESS**
Notary Public, Los Angeles
County [159]

It Is Ordered that the appeal herein be allowed as prayed for, and that bond for costs on appeal in the sum of \$250.00 be required, and that bond for \$88,000.00, or cash deposit of \$95,000.00 be required for supersedeas bond on appeal, and release of vessel from custody of the Marshall, and upon approval of the security deposited in this court, that the vessel Baja California, be released by the Marshall to Man-

nel Aguilar, Consul of Mexico at Los Angeles, California.

Dated: January 11, 1943.

BEN HARRISON

District Judge

[Endorsed]: Filed Jan. 11, 1943. [160]

[Title of District Court and Cause.]

BOND FOR COSTS OF APPEAL

Know All Men By These Presents, That we, The Republic of Mexico, and the sum of \$250.00 in cash, are held and firmly bound unto R. B. Hoffman, in the sum of two hundred and fifty dollars, to be paid to the said R. B. Hoffman, his heirs, executors, administrators or assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 11th day of January, 1943.

Whereas, the Republic of Mexico, as appellant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree of the District Court of the United States for the Southern District of California, bearing the date January 11th, 1943, in a suit wherein R. B. Hoffman is libellant [161] against the Steamship Baja California, her engines, etc.:

Now, Therefore, the condition of this obligation

is such that if the above named appellant, Republic of Mexico, shall prosecute said appeal with effect, and pay all costs which may be awarded against him as such appellant if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

MANUEL AGUILAR

Consul of Mexico

(Seal of Consul)

Sealed and delivered and taken and acknowledged this 11th day of January, 1943, before me.

(Seal)

BEN VAN TRESS

Notary Public in and for said
County.

Approved: Jan 11, 1943

BEN HARRISON

Judge

[Endorsed]: Filed Jan. 11, 1943. [162]

[Title of District Court and Cause.]

STIPULATION FOR RELEASE OF VESSEL

It Is Hereby Stipulated and Agreed that the Mexican steamship *Baja California*, her engines, boats, boilers, tackle, apparel and furniture, now in the custody of the United States Marshal for the Southern District of California, may be released to claimant upon claimant depositing with the Clerk of the United States District Court for the Southern District of California, the sum of Ninety-five Thousand

(95,000) Dollars, lawful money of the United States of America, upon such terms and conditions, approved by the said United States District Court for the Southern District of California, as will secure to libelant [163] the payment in full of the final decree herein, together with costs, interest and damages for delay, if for any reason the appeal herein is dismissed or if the said final decree is affirmed by the Circuit Court of Appeals for the Ninth Circuit, and to satisfy in full such modification of said final decree and such costs, interest and damages as the Appellate Court may adjudge and award if claimant fail to make its plea good.

It Is Further Stipulated that said deposit shall be a substitute for the said vessel and in all respects shall be subject to the jurisdiction, orders and processes of the said United States District Court and the Circuit Court of Appeals for the Ninth Circuit as if said vessel remained in the custody of said courts.

January 11, 1943.

McCUTCHEN, OLNEY,
MANNON & GREENE
HAROLD A. BLACK

Proctors for Libelant
JAMES R. JAFFRAY
BEN VAN TRESS

Proctors for Claimant

Approved Jan. 11, 1943

BEN HARRISON

J

[Endorsed]: Filed Jan 12, 1943. [164]

[Title of District Court and Cause.]

**UNDERTAKING ON CASH DEPOSIT IN LIEU
OF RELEASE AND SUPERSEDEAS BOND**

Whereas, lately at a District Court of the United States for the Southern District of California, in a suit depending in said court between libellant R. B. Hoffman, as owner of the American gas screw schooner Lottie Carson, as bailee of certain personal property, and as subrogee of interested underwriters, and the Mexican steamship Baja California, her engines, boats, boilers, tackle, apparel and furniture, as respondent, and the Republic of Mexico, as claimant, a final decree was rendered against the said steamship Baja California, her engines, [165] boats, boilers, tackle, apparel and furniture, in the sum of Eighty-one Thousand Seven Hundred Fifty-eight and $\frac{33}{100}$ (81,758.33) Dollars, together with costs in the amount of Four Thousand Six Hundred Thirty-one and $\frac{79}{100}$ (4,631.79) Dollars, with interest thereon from December 12, 1942, until paid, and certain other costs and charges of the officers of court accrued or to accrue against said steamship Baja California, and the said claimant Republic of Mexico having applied for the release of said vessel from the custody of the United States Marshal for the Southern District of California prior to sale pursuant to a writ of venditioni exponas issued herein, and the said claimant having also filed in said court a petition for appeal and having obtained an order allowing appeal to reverse the final decree in the aforesaid suit on appeal to the United States Circuit Court of Appeals

for the Ninth Circuit at a session of said Circuit Court of Appeals to be held at San Francisco, in the State of California, and

Whereas, the undersigned claimant Republic of Mexico desires to obtain the release of said vessel, and to stay the execution of said final decree and to make a deposit in cash with the Clerk of said United States District Court for the Southern District of California to secure the payment of said final decree in lieu of filing a release and supersedeas bond.

Now, Therefore, the undersigned claimant, Republic of Mexico, does herewith deposit with the said Clerk of the United States District Court for the Southern District of California, the sum of Ninety-five Thousand (95,000) Dollars, lawful money of the United States of America, upon the following terms and conditions:

That out of said deposit there shall be paid to said [166] libellant R. B. Hoffman or his proctors:

1. The full amount of the said final decree, together with interest, costs, including the charges and costs of officers of court, whether or not taxed at the time of said final decree, interest thereon and damages for delay:

- (a) In the event for any reason said appeal is dismissed, forthwith upon said dismissal:

- (b) In the event the said final decree is affirmed, immediately upon the receipt by the said United States District Court for the Southern District of California of the

mandate of said Circuit Court of Appeals
for the Ninth Circuit;

or

2. The full amount of any modification of
said final decree and such costs, interest and
damages as the Appellate Court may adjudge
and award, immediately upon the receipt by the
said United States District Court for the South-
ern District of California of the mandate of the
said Circuit Court of Appeals for the Ninth
Circuit.

If said final decree is reversed by said Circuit
Court of Appeals for the Ninth Circuit that the said
deposit shall be returned to claimant upon receipt
by said United States District Court for the South-
ern District of California of the mandate of said
Circuit Court of Appeals for the Ninth Circuit.

Said deposit shall be a substitute for the said
steamship *Baja California*, her engines, boats, boil-
ers, tackle, apparel and furniture, and shall be sub-
ject to the jurisdiction, orders and processes of the
said United States District Court and the said Cir-
cuit Court of Appeals to the same extent as if said
[167] vessel remained in the custody of said courts.

REPUBLIC OF MEXICO

(Seal) By MANUEL AGUILAR

Claimant

JAMES R. JAFFRAY

BEN VAN TRESS

Proctors for Claimant

Approved as to form and amount :

McCUTCHEN, OLNEY,
MANNON & GREENE
HAROLD A. BLACK

Proctors for Libelant

Approved: Jan. 11, 1943.

BEN HARRISON

J

[Endorsed]: Filed Jan. 11, 1943. [168]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The claimant Republic of Mexico in its own right and in behalf of the Steamship Baja California as owner thereof, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above entitled action as follows:

First. The District Court erred in failing to release said vessel upon the suggestion of the Republic of Mexico.

Second. The District Court erred in failing to enter a decree exempting the said vessel from all liability in connection with the collision referred to in the libel.

Third. The District Court erred in failing to find that the damages incurred by the Lottie Carson resulted from the negligence of its master.

Fourth. The District Court erred in ruling the finding of Judge McCormick was *res adjudicata* as to sovereign immunity.

Fifth. The District Court erred in finding (I) the action was brought on behalf of the California Packing Corporation.

Sixth. The District Court erred in finding (III) that the Baja California was in the possession of respondent *Compania Mexicana de Navegacion del Pacifico, S. de R. L.* [169]

Seventh. The District Court erred in finding (IV) after the arrival of the *Lottie Carson* at Mazatlan the cylinder heads were removed and remained removed until after the collision.

Eighth. The District Court erred in finding (IV) that without the cylinder heads the *Lottie Carson* could not move under her own power.

Ninth. The District Court erred in finding (V) that libelant was notified about 11:00 A.M., October 19, 1941, of the fire on the *Lottie Carson*.

Tenth. The District Court erred in finding (VI) that in the early afternoon of October 19, 1941, the anchor chain of the *Campeche* was partially cut, and the tug *Tepic* took a line from the *Campeche*.

Eleventh. The District Court erred in finding (VII) that the *Baja California* seeing that both vessels were in imminent danger, turned sharply to the north.

Twelfth. The District Court erred in finding (VII) The *Baja California*, seeing that both vessels were in imminent danger, turned sharply to the north, jerking the *Campeche* after her. Soon the *Baja California* found herself in the shallow water at the northerly end of the harbor. To avoid beaching herself, the *Baja California* hauled abruptly to

the east. At that time the Campeche was about opposite, to the west of and close to the port side of, the Lottie Carson. The stern of the Campeche was jerked in an easterly direction and then the Baja California cut the towline and left the Campeche adrift.

Thirteenth. The District Court erred in finding (VIII) that libelant's only chance of avoiding or lessening the force of the collision was to have the tug Tepic (which in the meantime had taken a line from the Lottie Carson's starboard side) pull the Lottie Carson in the opposite or easterly direction while the Lottie Carson let out her anchor cable as fast as possible. Although about 600 [170] feet of cable was paid out, it was not possible for the Lottie Carson to avoid the collision.

Fourteenth. The District Court erred in finding (IX) that she eventually sank in the shallow water in which she was beached. Nothing could be done to save her, although some personal property on board the vessel was removed. As a result of the collision the Lottie Carson became a total loss.

Fifteenth. The District Court erred in finding (X) that Baja California and those in charge of her were negligent in the following particulars:

1. In attempting to take the Campeche on so long a hawser in a maneuver to perform which successfully, it was necessary to put the Campeche ashore and escape going aground herself.

2. In towing the Campeche toward Creston Island instead of towing toward the open sea in the operation of breaking the Campeche loose from her anchor chain.

3. In towing the Campeche to the windward of and in close proximity to the Lottie Carson.

4. In cutting the towline to the Campeche at the precise time and place most likely to damage or destroy the Lottie Carson.

5. In attempting the maneuver at all without first definitely ascertaining that the Lottie Carson had been removed to a place of safety.

Sixteenth. The District Court erred in finding (XI) that the collision and total loss of the Lottie Carson were solely due to the fault of the Baja California and those in charge of her in the foregoing particulars.

Seventeenth: The District Court erred in finding (XII) that the Lottie Carson did not have any notice of danger of a collision until after it was impossible for that vessel to avoid the same. [171] The activity about the Campeche did not reasonably indicate that said vessel was going to be beached in the vicinity of the Lottie Carson. Only approximately twenty minutes elapsed between the commencement of the towing of the Campeche by the Baja California and the collision, and only three minutes elapsed between the cutting of the towline by the Baja California and the collision. The Port Captain gave no orders for the movement of the Lottie Carson in time to avoid the collision.

Eighteenth. The District Court erred in finding (XIII) that the Lottie Carson was not in anywise at fault as respects the collision. As soon as the Lottie Carson had any reason to believe that the Baja California intended to tow the Campeche in the vicinity

of the Lottie Carson, the Lottie Carson did everything that could reasonably be done to avert or minimize the collision. The Lottie Carson could not move without assistance. Under the circumstances then prevailing it would have been impossible for her to have moved under sail alone and her engines were not in working condition. The only assistance available was that given by the tug Tepic which was used as promptly and effectively as possible.

Nineteenth. The District Court erred in finding (XV) that the alleged laws of the Republic of Mexico offered in evidence by claimant were not pleaded nor were they sufficiently proved. The said laws were, therefore, not admissible in evidence. But even if said laws had been pleaded and properly proved, and if the procedural laws of Mexico were controlling in this action, there would be no difference in the decision. The said alleged laws were all complied with by the libelant. Specifically, libelant at all times herein mentioned complied with the orders of the Captain of the Port, the Port Pilot and other Mexican officials having authority in the premises at the port of Mazatlan. Libelant made a report or protest concerning the collision to the Captain of the Port at Mazatlan within twenty-four hours after the collision. Assuming [172] that under the law of Mexico no presumption of fault arises by reason of a collision between a moving vessel and one at anchor, and even assuming further that such law, if established, would be controlling in this action, the evidence in this case, apart altogether from pre-

sumptions, affirmatively shows that the Baja California was solely at fault.

Twentieth. The District Court erred in its conclusions of law, No. I, and each and every part thereof.

Twenty-first. The District Court erred in its conclusions of law, No. II, and each and every part thereof.

Twenty-second. The District Court erred in overruling the objections, and each of them, of the claimant to the report of the special master and in approving said report.

Twenty-third. The District Court erred in overruling the claimant's objections, and each of them, to the deposition of Walter Louis Martignoni, F. D. Fellow, John G. Peterson and P. Banning Young, and admitting such depositions, and each of them, in evidence.

Twenty-fourth. The decision of the District Court is against the law.

Twenty-fifth. The evidence is insufficient to justify Finding No. I to No. XV, inclusive, or any or either of them.

Dated: January 11, 1943.

BEN VAN TRESS and

JAMES R. JAFFRAY

By JAMES R. JAFFRAY

Proctors for Claimant

[Endorsed]: Filed Jan. 11, 1943. [173]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL
AND PRAECIPE FOR APOSTLES ON
APPEAL

Claimant and appellant, Republic of Mexico, hereby states that it desires to have reviewed in its appeal herein only the questions whether the Steamship Baja California should have been released from the process of the United States District Court for the Southern District of California on the ground that said vessel was immune from the jurisdiction of said District Court for the reasons set out in the suggestion of the Republic of Mexico; and whether the said District Court erred in disallowing [174] the defense of sovereign immunity interposed by said claimant and appellant.

Upon the understanding that the review upon the appeal herein shall be limited to the foregoing questions, it is hereby stipulated and agreed, by and between the parties hereto, as follows:

I

That the apostles on appeal of claimant and appellant, the Republic of Mexico, from the final decree herein dated December 12, 1942, shall consist of the following:

1. The style of the court;
2. The names of the parties;
3. Monition, citation and writ, with Marshal's return of service thereof filed December 24, 1941;
4. Libel, filed December 15, 1941;

5. Suggestion of the Republic of Mexico, filed December 24, 1941;

6. Amended Answer to Suggestion of Republic of Mexico, filed January 28, 1942;

7. Stipulation for hearing and as to the facts on issues raised by foregoing suggestion and answer, filed January 28, 1942;

8. Suggestion of United States Attorney, filed January 28, 1942;

9. Statement of libelant's position with respect to foregoing suggestion, filed January 29, 1942;

10. Transcript of proceedings at hearing before Judge McCormick January 29, 1942 (filed May 15, 1942), together with all exhibits offered in connection therewith, to wit: [175]

Libelant's Exhibits

1-A Inward Foreign Manifest, showing cargo destined for Port of Los Angeles

1-B Freight bills and bills of lading

1-C Inward Foreign Manifest, showing cargo destined for Port of San Francisco

1-D Freight bills and bills of lading

2 Certain Articles of the Law of General Lines of Communication, as mentioned in paragraph B(2) of stipulation

3 Additional Articles of the Law of General Lines of Communication attached as appendix B to libelant's brief filed herein February 3, 1942

Respondents' Exhibits

A Contract for the management and business operation of the steamships "Campeche" and "Baja California"

B-1 Libelant's translation of Contract, Exhibit A

B-2 Republic of Mexico's translation of Contract, Exhibit A

C Certificate of Secretary of State Cordell Hull of the United States certifying Ambassador Najera

D Authorization of Ambassador Najera of Mexico to Rodolfo Salazar, Consul of Mexico at Los Angeles

E-1 Certificate of Undersecretary of Marine of Mexico (in Spanish) with affidavit of Kenneth A. Byrns, Vice Consul of the United States at Mexico, attached thereto

E-2 Translation into English of Exhibit E-1

E-3 Certificate of Director General of National Properties of the Secretariat of Treasury and Public Credit of Mexico, with affidavit of Kenneth A. Byrns, Vice Consul of the United States at Mexico, attached thereto

E-4 Translation into English of E-3

F Group of documents with regard to the carrying of the mail [176]

G Permit in Spanish of Secretariat of the Navy of Mexico

G-1 Translation into English of Exhibit G

11. Copy of teletype message sent United States Attorney General by United States Attorney at Los Angeles January 31, 1942 (filed February 13, 1942);

12. Copy of telegram in reply thereto dated January 31, 1942 (filed February 13, 1942);

13. Minutes of January 29, 1942;
14. Order and decree denying sovereign immunity etc., made by Paul J. McCormick, United States District Judge February 13, 1942;
15. Stipulation and order extending time to claim and answer, dated March 5, 1942;
16. Stipulation and order extending time to claim and answer, dated March 16, 1942;
17. Answer to libel, filed March 30, 1942;
18. Claim signed by Martin Gavica, filed March 30, 1942;
19. Claim asserting sovereign immunity, filed March 30, 1942;
20. Exceptions to the claim last mentioned, filed April 4, 1942;
21. Exceptions to answer, filed April 4, 1942;
22. Suggestion by the United States Attorney, filed April 8, 1942;
23. Libellant's reply to the Suggestion by the United States Attorney, filed April 18, 1942;
24. Telegram, filed April 27, 1942: [177]
25. Reporter's transcript of proceedings on hearing of exceptions to claim and answer on April 27, 1942;
26. A stipulation as follows:

It Is Hereby Stipulated that the cause was tried on the merits on May 6, 1942, and on May 13 and 14, 1942; that witnesses were called and examined by both sides; that documentary evidence was introduced; that during the trial on May 14, 1942, counsel for the Republic of Mexico stated in answer to an inquiry from the

court that the Republic of Mexico had no evidence to offer on the subject of sovereign immunity other than that theretofore submitted to Judge McCormick on that question.

27. Memorandum opinion dated June 29, 1942;

28. Findings of Fact and Conclusions of Law dated July 31, 1942;

29. Interlocutory decree and order of reference, dated July 31, 1942;

30. A stipulation as follows:

Pursuant to the foregoing interlocutory decree and order of reference, a reference was duly had and evidence oral and documentary was submitted to Allan F. Bullard, Esq., as special master, who filed a report herein dated November 25, 1942.

31. Final decree, filed and entered December 12, 1942;

32. Petition for and order allowing appeal, dated January 11, 1943;

33. Bond for costs on appeal, dated January 11, 1943;

34. Stipulation for release of vessel, dated January 11, 1943;

35. Undertaking on cash deposit in lieu of release and supersedeas bond, filed January 11, 1943;

36. Assignment of Errors, filed January 11, 1943;

37. Citation on appeal, dated January 11, 1943;

38. This stipulation and Praecipe. [178]

II

In making up the record to be transmitted to the Circuit Court of Appeals, the Clerk of the District Court may omit all formal captions and titles except the captions on the libel and on the final decree herein, substituting in the case of omitted captions the words "Title of Court and Cause"; and that he may omit all verifications, substituting therefor the word "verified."

III

That the originals of all exhibits referred to above, whether printed or not, may be filed in the *Circuit of Appeals* and may be considered a part of the record; and it is hereby requested that such original exhibits be certified to and forwarded with the record to the Circuit Court of Appeals.

IV

It is hereby requested that the record on appeal be prepared in accordance with the foregoing stipulation and certified to the Circuit Court of Appeals for the Ninth Circuit.

In Witness Whereof, the parties hereto have caused this stipulation to be signed by their respective proctors this day of June, 1943.

McCUTCHEN, OLNEY, MAN-
NON & GREENE
HAROLD A. BLACK

Proctors for Libelant

R. B. Hoffman

BEN VAN TRÉSS

JAMES R. JAFFRAY

Proctors for Claimant

Republic of Mexico

It is so ordered.

BEN HARRISON

Judge

[Endorsed]: Filed Jun. 5, 1943. [179]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
APOSTLES AND DOCKET APPEAL

For Good Cause Shown, the time for filing the Apostles in the Appellate Court and for docketing the above entitled appeal in said court, to wit, United States Circuit Court in and for the 9th Circuit, is hereby extended to April 1st, 1943.

Dated: February 17, 1943.

BEN HARRISON

Judge of U. S. District Court

[Endorsed]: Filed Feb. 17, 1943 [180]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
APOSTLES AND DOCKET APPEAL

For Good Cause Shown, the time for filing the Apostles in the above entitled court, and for docketing the above entitled appeal in said court, is hereby extended to July 1, 1943.

Dated: March 31, 1943.

CURTIS D. WILBUR

Judge of U. S. Circuit Court

[Endorsed]: Filed Mar. 31, 1943. Paul P. O'Brien, Clerk.

A true copy. Attest: Mar. 31, 1943. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Apr. 1, 1943. Edmund L. Smith, Clerk; By John A. Childress, Deputy Clerk.

[181]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 181 inclusive contain the original Citation and full, true and correct copies of: Libel in Rem and in Personam; Monition and Citation and Writ of Attachment; Suggestion by the Republic of Mexico; Amended Answer to "Suggestion by the Republic of Mexico"; Stipulation; Sug-

gestion by the United States Attorney for the Southern District of California filed January 28, 1942; Statement of Libelant's Position with Respect to the Suggestion by the United States Attorney for the Southern District of California; Reporter's Transcript of Proceedings on January 29, 1942; Telegram dated Jan. 31, 1942; Telegram dated Feb. 3, 1942; Minute Order Entered January 29, 1942; Order and Decree Denying Sovereign Immunity and Release of Attached Mexican Steamship "Baja California" without Prejudice etc.; Two Stipulations and Orders Extending Time to Claim and Answer; Answer; Claim signed "M. Gavica"; Claim signed "R. Salazar"; Exceptions to the Claim Executed on behalf of the Republic of Mexico by the Honorable Rodolpho Salazar; Exceptions to the Answer; Suggestion by the United States Attorney for the Southern District of California filed April 8, 1942; Reply to the Suggestion by the United States Attorney for the Southern District of California filed on April 8, 1942; Telegram dated April 27, 1942; Reporter's Transcript of Hearing Exceptions of Libelant, R. B. Hoffman, to Answer, and to the Claim Executed on Behalf of the Republic of Mexico by the Hon. Rodolpho Salazar on April 27, 1942; Memorandum Opinion; Findings of Fact and Conclusions of Law; Interlocutory Decree and Order of Reference; Final Decree; Petition for Allowance of Appeal by the Republic of Mexico, as Claimant, and the Steamship Baja California by said Republic of Mexico, as owner and Order Allowing; Bond for Costs on Appeal; Stipulation for Release of

Vessel; Undertaking on Cash Deposit in Lieu of Release and Supersedeas Bond; Assignment of Errors; Stipulation re Record on Appeal and Praecipe for Apostles on Appeal; and Two Orders Extending Time to File Apostles and Docket Appeal, which, together with Original Libellant's Exhibits 1-A, 1-B, 1-C, 1-D, 2 and 3 and Original Respondents' Exhibits A, B-1, B-2, C, D, E-1, E-2, E-3, E-4, F, G and G-1 transmitted herewith constitute the Apostles on Appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing apostles amount to \$43.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24 day of June, 1943.

(Seal)

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Deputy Clerk.

[Endorsed]: No. 10475. United States Circuit Court of Appeals for the Ninth Circuit. The Republic of Mexico and The Steamship Baja California by the Republic of Mexico, as owner, Appellants, vs. R. B. Hoffman, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Southern District of California Central Division.

Filed June 25, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10475

REPUBLIC OF MEXICO and the Steamship
"BAJA CALIFORNIA,"

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL.

Appellant, Republic of Mexico, in its own behalf
and in behalf of the Steamship Baja California.

presents a Statement of Points upon which the appellant intends to rely on appeal, as follows:

I. The personality of a public ship is merged in that of the sovereign.

II. The personality of a sovereign is not subject to the jurisdiction of a court.

III. A public ship is not subject to a proceeding or libel in rem, or to the jurisdiction of a court.

The appellant Republic of Mexico in its own behalf and in behalf of the Steamship Baja California, as owner thereof, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above entitled action, as follows:

First: The District Court erred in failing to release said vessel upon the suggestion of the Republic of Mexico.

Second: The District Court erred in failing to enter a decree exempting the said vessel from all liability in connection with the collision referred to in the libel.

Third: The District Court erred in ruling the finding of Judge McCormick was *res adjudicata* as to sovereign immunity.

Fourth: The District Court erred in its conclusions of law, No. I, and each and every part thereof.

Fifth: The District Court erred in its conclusions of law, No. II, and each and every part thereof.

Sixth. The District Court erred in making and entering the Interlocutory Decree herein.

Seventh: The District Court erred in making and entering the Final Decree herein.

Eighth: The District Court erred in making and entering its Order Declining the Suggestion of the Republic of Mexico herein.

DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL

Said appellant designates the parts of the record which it thinks necessary for the consideration of the above points:

	Page
Answer	83
Praeceptum for Apostles on Appeal, Stipulation re. Record on Appeal and	174
Stipulation re. Record on Appeal and Praeceptum for Apostles on Appeal	174
Undertaking on Cash Deposit in Lieu of Re- lease and Supersedeas Bond	165
Claim signed "R. Salazar," Filed March 30, 1942	93
Decree and Order of Reference, Interlocutory	151
Decree, Final	154
Findings of Fact and Conclusions of Law, Filed July 31, 1942	142
Libel in Rem and in Personam	3
Monition and Citation and Writ of Attachment with Return of Service	15
Names and Addresses of Proctors	1

Order and Decree Denying Sovereign Immunity and Release of attached Mexican Steamship Baja California without prejudice, etc.	79
Stipulation for Release of Vessel	163
Suggestion by the Republic of Mexico	18
Libelant's translation of Contract, Exhibit A	
Certificate of Secretary of State, Cordell Hull of the United States certifying Ambassador Najera.	
Authorization of Ambassador Najera of Mexico to Rodolfo Salazar, Consul of Mexico at Los Angeles.	

Reference is had to the contents of "Stipulation re Record on Appeal and Praeceptum for Apostles on Appeal" for further details and stipulations re form and contents of record and apostles.

Reference is further had to the contents of the "Stipulation with respect to Reproduction of Exhibits Filed in Circuit Court re Printing the Record."

Reference is had to the last above stipulation regarding photostats for convenience and economy.

Dated: Los Angeles, California, June 29, 1943.

BEN VAN TRESS and

JAMES R. JAFFRAY

By JAMES R. JAFFRAY

Proctors for Appellant

(Affidavit of Service by Mail.)

[Endorsed]: Filed July 2, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**STIPULATION WITH RESPECT TO
REPRODUCTION OF EXHIBITS**

It Is Hereby Stipulated and Agreed, that all exhibits in this cause shall be reproduced as part of the printed record except the following, which may be omitted:

Respondents' Exhibit A—Contract for the management and business operation of the steamships "Campeche" and "Baja California";

Respondents' Exhibit B-2—Republic of Mexico's translation of Contract, Exhibit A;

Respondents' Exhibit E-1—Certificate of Undersecretary of Marine of Mexico (in Spanish) with affidavit of Kenneth A. Byrns, Vice Consul of the United States at Mexico, attached thereto;

Respondents' Exhibit E-3—Certificate of Director General of National Properties of the Secretariat of Treasury and Public Credit of Mexico, with affidavit of Kenneth A. Byrns, Vice Consul of the United States at Mexico, attached thereto;

Respondents' Exhibit G—Permit in Spanish of Secretariat of the Navy of Mexico.

It Is Further Stipulated that the above exhibits which are to be eliminated from the printed record may be considered in their original form.

It Is Further Stipulated that any exhibit which is to be included as a part of the printed record may be reproduced by photostating or other proc-

ess, rather than printing, if such reproduction may thereby be more conveniently or economically done.

Dated: June 26, 1943.

JAMES R. JAFFRAY
BEN VAN TRESS

Proctors for Appellants
FARNHAM P. GRIFFITHS
HAROLD A. BLACK
McCUTCHEN, OLNEY, MAN-
NON & GREENE

Proctors for Appellee

So ordered:

CURTIS D. WILBUR
United States Circuit Judge

[Endorsed]: Filed July 2, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AMENDING DESIGNATION
OF PARTS OF RECORD NECESSARY
FOR CONSIDERATION OF POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON THE APPEAL

It Is Hereby Stipulated and Agreed, that the designation of the portions of record to be contained in the record on appeal be amended to read:

“The parties hereto designate as the printed record necessary for consideration of the points on which appellant intends to rely:

1. The entire transcript as certified to the Clerk of this Court, together with all exhibits except the exhibits to be omitted or which may be photostated or otherwise reproduced pursuant to stipulation dated June 26, 1943;
2. Said stipulation dated June 26, 1943;
3. Statement of points on which appellant intends to rely on appeal;
4. This stipulation."

Dated: Los Angeles, California, July 2, 1943.

JAMES R. JAFFRAY

BEN VAN TRESS

Proctors for Appellants

FARNHAM P. GRIFFITHS

HAROLD A. BLACK

McCUTCHEN, OLNEY, MAN-

NON & GREENE

Proctors for Appellee

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[fol. 239] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

No. 10,475

THE REPUBLIC OF MEXICO and THE STEAMSHIP BAJA CALIFORNIA
by the Republic of Mexico, as Owner, Appellants,

vs.

R. B. HOFFMAN, Appellee

Upon Appeal from the District Court of the United States
for the Southern District of California, Central Division

Proceedings Had in the United States Circuit Court of
Appeals for the Ninth Circuit

[fol. 239a] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, March 20, 1944

Before: Denman, Mathews and Stephens, Circuit Judges

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Ben Van Tress,
proctor for appellant, and by Mr. Harold A. Black, proctor
for appellee, and submitted to the court for consideration
and decision.

[fol. 240] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

Excerpts from Proceedings of Friday, June 30, 1944

Before: Denman, Mathews and Stephens, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND CONCURRENCE AND
FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten
opinion and concurrence this day rendered by this Court in
above cause be forthwith filed by the clerk, and that a decree
be filed and recorded in the minutes of this court in accord-
ance with the opinion rendered.

[fol. 241] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT

Excerpts from Proceedings of Wednesday, July 19, 1944

Before: Mathews, Circuit Judge

By direction of Mathews, Circuit Judge, Ordered concurring opinion this day rendered by him in above cause be forthwith filed by the clerk in lieu of his concurring opinion filed June 30, 1944.

[fol. 242] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10,475

Jun. 30, 1944

THE REPUBLIC OF MEXICO and THE STEAMSHIP BAJA CALIFORNIA by the Republic of Mexico, as Owner, Appellants,

vs.

R. B. HOFFMAN, Appellee

Upon Appeal from the District Court of the United States
for the Southern District of California, Central Division

Before: Denman, Mathews and Stephens, Circuit Judges

DENMAN, Circuit Judge:

This is an appeal from a final decree holding the Steamer Baja California, owned by the appellant Republic of Mexico, hereinafter called the Republic, liable and awarding damages for the sinking and total loss of the American Schooner Lottie Carson in the Harbor of Mazatlan, Mexico, by the Baja California, then towing the Mexican Steamer Campeche, causing her tow to collide with the Lottie Carson. The sole question on the appeal is the validity of an order of the district court denying the Republic's claim of the Baja California's immunity from the jurisdiction of that court.

The appellee Hoffman had libeled the Baja California, a monition in rem issued to the Marshal, who gave due notice by citation to all persons claiming her. It is conceded that

the Republic's ownership and possession and her occupation in its service when the vessel was attached by the process in rem, would entitle it to withdraw her from the court's jurisdiction. Absent such ownership, possession and occupation, the jurisdiction continues and the Republic, if so [fol. 243] advised, could contest the issues tendered by the libel. It is also conceded that the Baja California is liable for the injuries and the decree must be affirmed if it be held that the Republic was not entitled to withdraw the Baja California from the admitted existing jurisdiction of the district court or, if so entitled, had waived its right to such withdrawal.

On December 24, 1941, the Republic's claim to immunity from the court's jurisdiction was first asserted in a Suggestion of the Mexican Consul at Los Angeles, California, acting for the Ambassador for Mexico to the United States. The suggestion alleged that the Baja California was owned by the Mexican Government and in its possession and service at the time of her seizure. On January 28, 1942, appellee answered this Suggestion of the Republic made through its consul, joining issue on the claim of such ownership, possession and service.

On the day of the filing of the answer to the first Suggestion, the United States Attorney for the Southern District of California, under the direction of the Attorney General, "as a matter of comity between the United States Government and the Government of Mexico for such consideration as this Court may deem necessary and proper" filed a second Suggestion transmitting a Note of the Mexican Ambassador to our Secretary of State, but claiming no more than that the Baja California was owned by the Republic when she came into the jurisdiction of the district court. Since our government did not "recognize or allow" the second Suggestion of the Republic, but did no more than to present it, the jurisdiction of the district court continued for the determination of the issue joined on the first Suggestion.¹

The district court, at a preliminary hearing, entertained the issue so raised. Evidence was adduced and the court gave its order and decree holding that it was "unable at this

¹ The Navemar, 303 U. S. 68; The Katingo Hadjipatera, 119 F. 2d 1022, affirming 40 F. Supp. 546.

time to find * * * any requirement or ground ousting the jurisdiction of this court in this proceeding," and declined to allow the withdrawal of the vessel. The interlocutory character of the order of declination appears not only from the words "at this time" but from the court's further holding that "The foregoing order is in toto made and entered [fol. 244] without prejudice to intervention and/or claim herein by the Republic of Mexico and/or the Ambassador to the United States for the Republic of Mexico and/or his accredited representative and agent, within twenty days from this date, for the purpose of asserting the Mexican Government's ownership and right to possession of the vessel in controversy, and any other applicable remedy or relief * * *."

The time to intervene and assert any or all the Republic's claims was extended to March 26, 1942. No default having been taken against the Republic, it was within its right to respond to the citation when, four days later, it filed its claim and answer to the libel, in which it again asserted its sovereign right to withdraw the vessel. In the absence of default, no error is or could be asserted as to the time of the filing of the repeated claim of immunity. However, it is claimed that the Republic's answer, though it "expressly reserves the right of sovereign immunity," is a general appearance which waives its right to withdraw the vessel from the court's jurisdiction.

We hold that the decision "without prejudice" and "at this time" holding adversely to the Suggestion of the right to withdraw the vessel, did not deprive the court of jurisdiction again to entertain it and that a sovereign in response to the citation in rem may assert all its rights in the res, at the same time including its reserved sovereign right to withdraw the vessel from the court's jurisdiction. In *The Navemar*, supra, at page 76, the Supreme Court said of a similar suggestion by the Spanish Government

"* * * But as the suggestion was tendered in support of an application to appear as a claimant in the suit, and as it put forth a claim to title and right to possession of the vessel, the Ambassador should have been permitted to intervene and, if so advised, to litigate its claim in the suit. In *Ex parte Muir*, supra, and in *The Pesaro*, supra, 219, the Ambassador of the intervening government challenged the jurisdiction of the court, but

did not place himself or his Government in the attitude of a suitor. Here the application as construed by the trial court was for permission to intervene as a claimant. We think the applicant should be permitted to occupy that position if so advised."

[fol. 245] A different judge heard the case on the claim and answer of the Republic to appellee's libel. That judge found that "Claimant has set forth no additional evidence and has shown no extraordinary circumstances justifying this court in again passing upon the issue of sovereign immunity. If claimant was dissatisfied with the prior ruling of Judge McCormick, it could have had the issue finally determined on review by an appellate court."

Assuming, though not deciding, that an appeal could have been taken from Judge McCormick's order, deciding an issue raised as to but one of the "bundle of rights" constituting national ownership,² we hold that the order may be reviewed on this appeal from the final decree.

It is agreed here that the title to the *Baja California* was in the Republic. The Republic contends that it had possession of the *Baja California* at the time the torts occurred and was operating her in a governmental service, bringing her within the decision of *The Western Maid*, 257 U. S. 415. In that case *The Western Maid*, owned by the United States, was held immune. She was allocated by the government to the United States Shipping Board for service as a transport and was carrying foodstuffs for civilian relief in Europe to be administered under the United States Food Administration Grain Corporation. She was manned by a Navy crew. The Court said, " * * * that she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandising than if she had carried a regiment of troops." Supporting its decision in *The Western Maid*, the Supreme Court cites with approval a New York circuit court case, *The Fidelity*, Fed. Cas. No. 4758, in which that court stated, "Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the

² Under 28 U. S. C. A. § 227; cf. *Schoenamsgruber v. Hamburg American Line*, 294 U. S. 454, 458.

public use, and must be employed in carrying on the operations of the government." (Emphasis supplied.)

The appellee contends that the Republic has not brought the case within the Western Maid decision, because it was [fol. 246] not operating the Baja California and she was not engaged in any public function or devoted to a public use. On the contrary, appellee contends, that by contract the Republic had delivered her over to a private Mexican corporation, the Compania Mexicana de Navegacion del Pacifico, S. de R. L., hereinafter called the Corporation, for the Corporation's possession and control in a private freighting venture, where it was seeking its profits exactly as does every other vessel in the Mexican Merchant Marine.

We agree with appellee's contention and the district court's finding that "At the time of the collision * * * and at the time of filing the libel and the service of the motion herein, she [the Baja California] was in the possession, operation and control of respondent Compania Mexicana de Navegacion del Pacifico, S. de R. L."

It was stipulated in writing and admitted in open court by proctors for the Republic that the Baja California was "delivered by the Mexican Government on August 27, 1941, to the Cia Mexicana de Navegacion del Pacifico, the Corporation made a respondent *in personam* in the libel," and that the Baja California was on and after October 3, 1941, "and at the time of seizure under process herein, being operated by the said Cia Mexicana de Navegacion del Pacifico under the terms and conditions of the contract designated said Republic's Exhibit 'A'." The contract itself recites the fact that the Baja California was delivered by the Republic to Mr. Abaunza, the general manager of the Corporation, on August 27, 1941.

Full provision for the formalities and details of transfer or delivery of the vessel to the Corporation is contained in the Sixth Article of the contract. The contract provided that the Corporation was to "commercially operate and handle" the vessel for a period of five years with an option to renew the contract for an additional five years. The Corporation is privately owned and operated, with a paid in capital of one hundred thousand pesos.

The Republic, doubtless because it was aware of the universal maritime rule of liability in rem for cargo and col-

lision damage for which the vessel is responsible, inserted the following provision in the contract:

[fol. 247] "Fifth: The Company promises to insure the said ships against all risks, and to keep in operation the respective insurance policies for the duration of this contract."

This provision, and the Third Article relating to operating expenses, show that the entire risk of the venture was intended to be thrown upon the Corporation. It was in no sense the *alter ego* or mere operating agency for the Republic. If there were losses arising from the operation or handling of the Baja California, they were to be borne by the Corporation—presumably either from accumulated surplus, if any, from capital, from loans, or from insurance policies covering "all [insurable] risks." If the aggregate expenses were less in amount than the gross income, the Corporation was to pay to the Republic an amount equivalent to one-half the net profits.

In pursuance of the terms of the contract the Corporation did retain possession of the Baja California and direct her commercial operation. It manned the vessel with its own officers and crew and paid their salaries and wages, furnished and paid for all supplies and all other expenses incurred in her operation.

The Baja California was not being operated basically differently from other private Mexican merchant vessels. The contract requirement that one-half the net profits of the vessel's operation should be paid to the National Treasury merely complies with Article 110 of the Mexican law of General Means of Communication providing for governmental "participation" in the revenue of all private companies operating means of transport, which participation shall be specified in the concessions or permits. The contract requirements that the vessel follow routes determined by the Mexican Navy, carry the mails, and transport federal officials at 50 percent of the regular fares are those which Articles 200, 104 and 102 of the Mexican Law of Means of Communication respectively impose on all merchant vessels.

The Republic claims that even though the Baja California was not in its possession, either when the collision occurred or when libeled in rem and seized by the Marshal, the mere fact of ownership of her title warranted her withdrawal

from the court's jurisdiction. The district court held [fol. 248] against this contention and we agree. In admiralty sovereign immunity requires actual and not the mere constructive possession flowing from ownership of the title.

This question was determined by the Supreme Court in *The Navemar*, supra. In that case a private Spanish ship-owning corporation libeled the Steamer Havana in the district court for the Eastern District of New York, seeking to regain her possession from a mutinous crew who had taken possession. The vessel was attached and in the possession of the Marshal and a default decree was rendered in favor of the libellant. While on the voyage enroute to New York, the Spanish Government issued a decree of attachment transferring the title from the corporation to the government. The Spanish Ambassador, without recognition of the claim by our State Department or otherwise, sought to have the default decree set aside and (a) to withdraw the vessel from the jurisdiction of the district court, claiming ownership and possession in the Spanish Government, and (b) otherwise, if the jurisdiction was not withdrawn, to intervene and assert the Spanish Government's ownership and right to possession.

On the issue of the right to withdraw the vessel from the jurisdiction of the district court, the Ambassador's affidavits purporting to show that the Spanish Government had taken possession under its decree were met by the counter-affidavits of the corporation. The district court held, on the facts, that the Spanish Government had not acquired possession under the decree and that lacking possession the *Navemar* was not immune from seizure in rem. On the alternative issue of the right of the Spanish Government to intervene as a litigant recognizing the jurisdiction of the court and invoking its decision on the question of ownership and right to possession, the district court held against that government and refused to set aside the default decree.

On appeal the Second Circuit reversed, holding that the district court was concluded by the Spanish Government's mere claim of possession—that is, although the claim was not supported by our government the claim could not be denied and, without more, required the *Navemar's* withdrawal from the district court's jurisdiction. The circuit court of appeals decreed the dismissal of the libel.

[fol. 249] On certiorari to the Supreme Court the order of the circuit court of appeals dismissing the libel was reversed, that Court holding that unless recognized by our government the foreign government's claim of immunity merely tendered an issue which could be joined for a decision. The finding of the district court of want of possession in the Spanish Government was sustained and its decree declining to yield its jurisdiction was affirmed. On the question of the right of Spanish Government to intervene to set aside the default and seek to establish ownership and right to possession, the district court was reversed and the case was returned to that court to entertain these contentions.³

We agree with appellee that this case is controlled by the *Navemar* decision. In both cases the ownership was in the governments seeking immunity. In both the wrongful acts complained of by the libelants occurred when the vessels were not in the possession of those governments. Their possession did not exist when the vessels were attached in the proceedings in rem. We are unable to make any pertinent distinction between the position of a government which has acquired title but not possession of a vessel and that of a government owning a vessel, of which, by contract, it has surrendered possession to a private corporation which is acting independently in a private enterprise.

We hold that the Republic of Mexico was not entitled to withdraw the *Baja California* from the jurisdiction of the district Court.

The decree is affirmed.

MATHEWS, Circuit Judge, concurs in the result.

(Endorsed:) Opinion and Concurrence. Filed Jun. 30, 1944. Paul P. O'Brien, Clerk.

³ On the second hearing the district court held against the Spanish Government's claim of ownership and right to possession. 24 F. Supp. 495. The circuit court of appeals reversed and awarded the vessel to the Spanish Government, incidentally stating, "Moreover the Supreme Court referred back only the question of title and right to possession for determination at the new trial, and not the question whether the *Navemar* was immune from judicial process." 102 F. 2d at 446.

[fol. 250] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10,475

Jul. 19, 1944

THE REPUBLIC OF MEXICO, Appellant,

vs.

R. B. HOFFMAN, Appellee

Appeal from the District Court of the United States for
the Southern District of California, Central Division

Before Denman, Mathews and Stephens, Circuit Judges.

MATHEWS, Circuit Judge (Concurring in the result:)

The Mexican steamship Campeche, in tow of the Mexican steamship Baja California, collided with the American schooner Lottie Carson in the harbor of Mazatlan, Sinaloa, Mexico. The Baja California was owned by appellant, the Republic of Mexico, but was not in appellant's possession or service. Instead, she was in the possession of and was operated by a Mexican corporation. The collision was caused by the corporation's negligence and resulted in the sinking and total loss of the Lottie Carson. Appellee, R. B. Hoffman, owner of the Lottie Carson, libeled the Baja California in the District Court of the United States for the Southern District of California, seeking thereby to recover damages for the loss of the Lottie Carson. Process was issued and the Baja California, being then within the Southern District of California, was attached by the United States Marshal for that District.

Appellant, appearing specially, suggested to the court that the Baja California was immune from process and hence should be released.¹ In a note to the Secretary of

¹ My associates (Judges Denman and Stephens speak of this suggestion as "a suggestion of the Mexican consul at Los Angeles, California." Actually, it was appellant's suggestion, signed by its proctors, Ben Van Trees and James R. Jaffray, members of the bar of the District Court and of this court.

[fol. 251] State of the United States, appellant's Ambassador to the United States claimed that the Baja California was immune and requested the Secretary to recognize the claimed immunity and to obtain recognition thereof by the court. Instead of complying with the Ambassador's request, the Secretary transmitted to the Attorney General of the United States a copy of the Ambassador's note and requested the Attorney General to direct the United States Attorney for the Southern District of California to appear before the court and "report to it the position of [appellant] as set forth in the Embassy's note." That was done.² The court refused to recognize the claimed immunity and entered a decree in appellee's favor. From that decree this appeal is prosecuted.

Appellant specifies as error the court's refusal to recognize the claimed immunity, appellant's contention being that such immunity existed despite the fact that the Baja California was not in appellant's possession or service. The contention must be, and is, rejected upon the authority of *Compania Espanola v. The Navemar*, 303 U. S. 68. Holding, as we must, that the claimed immunity did not exist, we need not and, I think, should not consider appellee's contention that the right to claim it was waived by appellant.

My associates say: "It is conceded that the Republic's [appellant's] ownership and possession and her occupation in its service when the vessel [the Baja California] was attached . . . would entitle it to withdraw her from the court's jurisdiction. . . . It is also conceded that the decree must be affirmed if it be held that the Republic was not entitled to withdraw the Baja California from the admitted existing jurisdiction of the District Court or, if so entitled, had waived its right to such withdrawal." There are no such concessions. Appellant did not admit

² The United States Attorney labeled his report "Suggestion by the United States Attorney for the Southern District of California." My associates describe it as "a second suggestion transmitting a note of the Mexican Ambassador to our Secretary of State, but claiming no more than that the Baja California was owned by the Republic [appellant] when she came into the jurisdiction of the District Court." Actually, the United States Attorney's report claimed nothing, suggested nothing.

the District Court's jurisdiction of the Baja California, nor seek to "withdraw" her from that jurisdiction. Instead, appellant sought her release upon the ground that she was immune from process, which is to say, upon the ground that the court had no jurisdiction of her; appellant's suggestion being, in effect, a plea to the court's jurisdiction.³

My associates say: "The District Court * * * declined to allow the withdrawal of the vessel." Actually, no question of "withdrawal" was ever presented to or considered by the court.

My associates say: "No default having been taken against the Republic, it was within its right to respond to the citation when * * * it filed its claim and answer, in which it again asserted its sovereign right to withdraw the vessel. * * * However, it is claimed that the Republic's answer * * * is a general appearance which waives its right to withdraw the vessel from the court's jurisdiction." Actually, appellant never asserted any right to "withdraw" the vessel. No such right having been asserted, there was, of course, no claim that any such right had been waived. What appellant asserted in its suggestion and reasserted in its answer and claim was that the vessel was immune from process. Appellee contended that the claimed immunity, if it existed, was waived. Since, as we hold, the claimed immunity did not exist, the question of waiver need not be considered.

My associates say: "We hold that the [District Court's] decision * * * holding adversely to the suggestion of the right to withdraw the vessel did not deprive the court of jurisdiction again to entertain it and that a sovereign in response to the citation in rem may assert * * * its reserved right to withdraw the vessel from the court's jurisdiction." There was in this case no suggestion or assertion of any right to "withdraw" the vessel from the court's jurisdiction and, therefore, no decision on that subject.

My associates say: "The Republic claims that * * * the mere fact of ownership of her [the Baja California's] title warranted her withdrawal from the court's jurisdiction. * * * We hold that the Republic of Mexico was not entitled to withdraw the Baja California from the ju-

³ Cf. *Compania Espanola v. The Navemar*, supra.

jurisdiction of the District Court." Actually, no question of "withdrawal" is presented. Nowhere in the record or in the briefs of counsel is "withdrawal" mentioned. The first mention of it was by my associates.

Referring to the case of *Compania Espanola v. The Navemar*, supra, wherein a Spanish corporation libeled a Spanish vessel and obtained a default decree in the District [fol. 253] Court of the United States for the Eastern District of New York, my associates say: "The Spanish Ambassador * * * sought to have the default decree set aside and (a) to withdraw the vessel from the jurisdiction of the District Court, claiming ownership and possession in the Spanish Government, and (b) otherwise, if the jurisdiction was not withdrawn, to intervene and assert the Spanish Government's ownership and right to possession. On the issue of the right to withdraw the vessel from the jurisdiction of the District Court, the Ambassador's affidavits * * * were met by the counter-affidavits of the corporation." Actually, no "withdrawal" was sought, nor was any question of "withdrawal" presented, considered or decided in the *Navemar* case. The *Navemar* case is, however, authority for the proposition that a vessel owned by, but not in the possession of service of, a foreign government is not immune from process.

The decree should be affirmed.

(Endorsed:) Concurring Opinion. Filed Jul. 19, 1944.
Paul P. O'Brien, Clerk.

[fol. 254] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 10,475

THE REPUBLIC OF MEXICO, ET AL., Appellants,

vs.

R. B. HOFFMAN, Appellee

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for

the Southern District of California, Central Division and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellants.

It is further ordered, adjudged, and decreed by this Court, that the appellee recover against the appellants for his costs herein expended, and have execution therefor.

(Endorsed:) Decree filed and entered June 30, 1944, Paul P. O'Brien, Clerk.

[fols. 255-256] UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, August 4, 1944

Before Denman, Mathews and Stephens, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed July 29, 1944, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby is denied.

[Fol. 257] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 6, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



FILE COPY

IN THE
Supreme Court of the United States

October Term, 1943

No. 455

THE REPUBLIC OF MEXICO and

THE STEAMSHIP "BAJA CALIFORNIA" by the Republic
of Mexico, as Owner,

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

Petition for Writ of Certiorari to the Ninth Circuit
Court of Appeals of the United States and Brief
in Support Thereof.

MORRIS LAVINE,

619 Bartlett Building, Los Angeles 14,

Proctor for the Republic of Mexico and the Steamship
"Baja California" by the Republic of Mexico, its
owner.

RAOUL MAGAÑA,

215 West Seventh Street, Los Angeles 14,

Of Counsel.

TOPICAL INDEX

	PAGE
Petition for writ of certiorari.....	1
Short statement of the case.....	2
Issues presented by this petition.....	5
Grounds for granting a hearing on the writ of certiorari.....	6
Cases believed to sustain jurisdiction and cases and statutes relied on	8
Brief in support of petition for certiorari	9
The District Court erred in failing to release the vessel upon proof of title to the vessel being in the government of Mex- ico	9
The Navemar Case, 33 U. S.....	13

TABLE OF AUTHORITIES CITED.

CASES.	PAGE.
Belnap v. Schild, 161 U. S. 10.....	11
Berrizi Bros. v. Pesaro, 271 U. S. 562.....	15, 17
Briggs v. Light Boats, 11 Allen (Mass.) 157.....	17
Carlo Poma, 259 Fed. 369 (C. C. A. 2), rev'd on jurisdictional grounds, 255 U. S. 219.....	15, 17
Clallam County v. United States, 263 U. S. 341, 68 L. Ed. 328, see S. Ct. 121.....	12
Crapo v. Kelly, 83 U. S. 610.....	16
Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 Fed. (2d) 705.....	11
E. B. Ward, Jr., 17 Fed. 456.....	16
Kawananakoa v. Polyblank, 205 U. S. 349.....	11
Keokus v. United States, 260 U. S. 125.....	11
Long v. Tampico, 16 F. 491 (D. N. Y.).....	17
Oetjen v. Central Leather Co., 246 U. S. 297.....	16, 17
Re Muir, 254 U. S. 522.....	8
Stanley v. Schwalby, 147 U. S. 508.....	11
The Adriatic, 258 Fed. 902.....	17
The Attualita, 238 Fed. 909 (C. C. A. 4).....	17
The Beaverton, 273 F. 539 (D. N. Y.).....	17
The Carlo Poma, 255 U. S. 220.....	8
The Davis, 10 Wall. 15.....	8, 17
The Exchange, 7 Cranch. 116.....	15
The Jassy (1906), P. 230.....	16
The Johnson Lighterage No. 24, 231 Fed. 365 (D. N. J.).....	17
The Jupiter (1924), P. 236.....	16, 17
The Maipo, 252 Fed. 627 (D. N. Y.).....	16
The Navemar, 303 U. S. 68; 82 L. Ed. 607.....	8, 11, 13
The New York, 256 U. S. 503.....	8

PAGE

The Parlement Belge, 5 P. D. 197.....	16, 17
The Pesario, 225 U. S. 216.....	2, 8, 16
The Pesaro, 271 U. S. 562.....	8
The Porto Alexandre (1920), P. 30.....	16
The Ricardo, 99 Fed. (2d) 935.....	11
The Roseric, 254 Fed. 154 (D. N. J.).....	17
The Schooner Exchange, 7 Cranch, 11 U. S. 116.....	8, 11
The Scotland, 105 U. S. 27.....	16
The Siren, 7 Wall. 74 U. S. 152.....	10
The Western Maid, 25 U. S. 419.....	8, 10
United States v. Belmont, 85 Fed. Rep. (2d) 543.....	18
United States v. Clark, 8 Pet. 436.....	8, 11
United States v. County of Allegheny, 88 L. Ed. 852.....	12, 20
United States v. Lee, 106 U. S. 196.....	8
United States v. Rogers, 150 U. S. 249.....	16
Wilson v. McNamee, 102 U. S. 574.....	16

STATUTES.

United States Codes Annotated, Title 28, Sec. 347.....	2, 8
United States Constitution, Article III, Sec. 2, Clause 1.....	2

TEXTBOOKS.

1 Benedict on Admiralty (Fifth Edition) 296.....	21
31 Columbia Law Review, 660, 662.....	17
Hyde, International Law, Vol. 1, Sec. 256.....	17

IN THE
Supreme Court of the United States

October Term, 1943

No.

THE REPUBLIC OF MEXICO and
THE STEAMSHIP "BAJA CALIFORNIA" by the Republic
of Mexico, as Owner,

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Harlan F. Stone, Chief Justice of the
Supreme Court of the United States, and to the
Honorable Associate Justices Thereof.*

Your petitioners, the Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico as Owner, petition this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to have certified to you the record in the case of the Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico as Owner, Appellants, vs. R. B. Hoffman, Appellee, No. 10475 in the United States Circuit Court of Appeals for the Ninth Circuit, and in respect thereto respectfully allege as follows:

A.

Jurisdiction is conferred upon this Court by Title 28, Section 347 United States Codes Annotated, Article III, Section 2, Clause 1, U. S. Constitution. The decision of the Circuit Court of Appeal for the Ninth Circuit dated June 30, 1944, was a final decision. "The Pesario," 225 U. S. 216.

The District Court of the United States, Southern District of California, Central Division, had assumed or acquired jurisdiction of the Steamship "Baja California," a vessel owned by the Republic of Mexico, where a fire occurred in Mexican waters in the harbor of Mazatlan, and as a result of maneuvers growing out of the fire which subsequently occurred, the appellee's ship was damaged and later sunk.

B.

Short Statement of the Case.

R. B. Hoffman, an individual, was the owner of the "Lottie Carson," a vessel of 234 tons net, which was fitted for fishing for sharks and had gone to the harbor of Mazatlan, Mexico, during October, 1941, for that purpose. During the morning of October 19, 1941, the "Lottie Carson" was lying at anchor in the harbor of Mazatlan, when the Mexican Steamship "Campeche" which had been lying at anchor in that harbor and farther out, and in a southeasterly direction from the "Lottie Carson," caught fire at about 11:00 A. M. The keeper of the port directed the "Baja California," a vessel of approximately 579 tons, owned by the Govern-

ment of Mexico, to tow the "Campeche" into the harbor. The "Baja California" proceeded to do so. During the course of the towing operations the "Campeche" went adrift, as a result of which the rudder of the "Campeche" struck the "Lottie Carson" on her port side, severely damaging the latter ship and cutting a hole in the planking of her side below the water line, resulting in the sinking of the "Lottie Carson." It was claimed that the "Baja California" was at fault, the libellant asserting that the "Baja California" let go the tow line which held the "Campeche," which was denied by the "Baja California."

All of these events took place within the port of Mazatlan, Mexico, within the three-mile limit of the shores of Mexico.

The "Baja California" is owned by and title is in the Government of Mexico. It is operated by the C. I. A. Mexicana de Navigacion del Pacifico S. de R. L. This company has a contract for the management and business operation of the steamship "Baja California." [R. 48.] The operating contract is for five years. [R. 60.] The government receives fifty per cent of the distributable profit. [R. 61.] Title at all times remains in the Government of Mexico. The ship, carried on and is bound to carry on public service or forfeit the contract; the Mexican Government [R. 58] retained and retains ownership at all times.

At the outset of the suit the Republic of Mexico filed suggestions asserting its ownership of the vessel.

On December 15, 1941, R. B. Hoffman, appellee, filed a libel, No. 1961 V. H. in the District Court of the United States for the Southern District of California, Central Division, against the Mexican Government owned steamship "Baja California," which steamship was then in the friendly port of San Pedro, California, in Los Angeles Harbor. The libel was issued upon the steamer and it was arrested and taken into possession by the Marshal of the Court in the Harbor of Los Angeles. [R. 2-16, incl.]

On December 24, 1941, the Ambassador to the United States for the Republic of Mexico, Dr. Nejara, filed a suggestion by special appearance showing that the said steamship was at all times mentioned in the libel *owned* by the Republic of Mexico. [R. 19-21.]

On April 8, 1942, the Department of State transmitted to the Court its statement that it accepted as true that the "vessel is the property of the Mexican State." [R. 147-162.] This was accompanied by a suggestion from the Ambassador of Mexico, not only that the vessel was the property of the State, but that the occurrences took place in the port of Mazatlan, which would be close to the witnesses and the scene of the occurrences. Nevertheless, in the face of these statements and suggestions by the Mexican Government and declaration of the Department of State, the trial court assumed and asserted jurisdiction and proceeded against the Mexican Sovereign Government and the ship to judgment.

Issues Presented by This Petition.

1. May a vessel owned by a foreign government, holding title to that vessel and exercising dominion over it be the subject of an action *in rem* in the District Court of the United States?

2. Does the District Court of the United States have jurisdiction of a foreign government and its property, to-wit, a ship, when it anchors in a port of the United States, to libel and seize that ship for an accident happening in its own territorial waters and its own port?

3. Where title and dominion to a ship are in a friendly foreign power, and it is *in the public service of that country* but is operated by a corporation under what might be termed a "lend-leasing contract" for five years, is the ship subject to libel in a court of the United States, even though absolute ownership is in the government of the friendly nation *itself*?

4. Must the District Court of the United States accept as true the finding of fact of the Secretary of State that the vessel is owned by a friendly foreign power, and on the basis of this finding alone dismiss the action for want of jurisdiction?

5. Does a friendly foreign government waive its sovereign immunity by answering in a court of the United States on the merits, during which at all times it preserves the challenge to the jurisdiction of the court for want of sovereign immunity?

C.

**Grounds for Granting a Hearing on the Writ of
Certiorari.**

The questions raised by this petition are new and of great importance to the various countries of the world today. The case involves:

1. The sovereign immunity of the Republic of Mexico, a highly friendly nation, in its title and ownership to one of its vessels.

2. The duty of the courts of the United States to pass upon the question of jurisdiction itself in the first instance, where title and ownership of a vessel are in a friendly foreign power.

3. Where the United States has loaned and leased millions of dollars worth of property in which the title remains in the United States, this case may set an important precedent in the seizure of our property to which the United States has title, in other harbors and ports of the world under the same or similar situations. The true meaning of "title" as giving sovereign immunity must be clearly defined.

4. Where the State Department assures the court that title and ownership of a ship are in a friendly foreign power, does it not become the duty of the District Court of the United States to immediately dismiss the proceedings for want of jurisdiction against that foreign power?

5. Where a foreign sovereign makes its appearance in a District Court of the United States, to defend and protect its title, does it by so doing waive its sovereign immunity?

6. Where an accident occurs in the port of a friendly foreign nation, in which a ship owned by that nation is involved, and within its own territorial waters, and its witnesses were all available and acceptable within that nation's court, should not the District Court of the United States dismiss the action and require the libellant to proceed in the court of the nation where the occurrence took place?

7. Where one judge of a District Court at the beginning of a case ruled against the question of sovereign immunity in the face of the suggestion of a foreign power, should this become the law of the case so as to preclude the foreign government from again raising the issue during the trial of the case? In other words, is the trial judge precluded from passing upon jurisdiction because at a preliminary hearing on the subject a former judge decided against the question of sovereign immunity?

8. Has sovereign immunity been presented so fully as to preclude further action except a dismissal of the case?

D.

Cases Believed to Sustain Jurisdiction and Cases and Statutes Relied on.

Title 28, Section 347, United States Codes;

The Navemar, 303 U. S. 68; 82 L. Ed. 667;

The Carlo Poma, 255 U. S. 220;

The Western Maid, 25 U. S. 419;

The Schooner Exchange, 7 Cranch, 11 U. S. 116;

The Davis, 10 Wall. 15;

Re Muir, 254 U. S. 522;

The Pesaro, 255 U. S. 216;

The New York, 256 U. S. 503;

The Pesaro, 271 U. S. 562;

United States v. Clark, 8 Pet. 436;

United States v. Lee, 106 U. S. 196.

Respectfully submitted,

MORRIS LAVINE,

*Proctor for the Republic of Mexico and the Steamship
"Baja California" by the Republic of Mexico, its
owner.*

RAOUL MAGAÑA,
Of Counsel.

IN THE
Supreme Court of the United States

October Term, 1943

No.

THE REPUBLIC OF MEXICO and

THE STEAMSHIP "BAJA CALIFORNIA" by the Republic
of Mexico, as Owner,

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.

The District Court Erred in Failing to Release the
Vessel Upon Proof of Title to the Vessel Being
in the Government of Mexico.

It was established in the District Court that the vessel belonged to the Republic of Mexico. The Republic of Mexico laid claim to the vessel and appeared in court with the proper claim to ownership of the vessel. [R. 142, 143.] Thereafter the Republic of Mexico officially presented its claim of ownership to the Department of State. Sumner

Wells, Acting Secretary of the Department of State, informed the District Court:

"The Department accepts as true the statement that the vessel is the property of the Mexican State. This appears also to have been accepted by proctors for the libellant, as shown by paragraph (4) of the attached copy of a document which apparently was submitted to the court by them under the heading 'Analysis of the Note of the Honorable F. Castillo Najera.'" [R. 149.]

The Republic of Mexico correctly stated its position and the law relative to the case, and the District Court erred in not accepting it. Its position was expressed as follows:

"It is my Government's contention that, upon acceptance by the libellant of my Government's ownership of the vessel 'Baja California,' all *in rem* proceedings should have ended. Their continuation by the United States District Court was tantamount to placing my Government in the position of a party defendant in a legal action. In this respect, my Government contends that it is a rule of International Law—established beyond dispute—that the courts of a country are not empowered to implead a foreign sovereign." [R. 158.]

This is the doctrine of *The Siren*, 7 Wall. 74 U. S. 152, which holds that the sovereign cannot be sued without his consent. The same exception extends to his property, and a claim *in rem* cannot be forced against the sovereign whose property is immune from seizure.

In "*The Western Maid*," 257 U. S. 419-433, it is held that the personality of a public vessel is merged in that

of the sovereign. Therefore the immunity of a sovereign inheres in his public vessel.

In *Keokuk v. United States*, 260 U. S. 125, it is held that sovereign property is exempt from seizure for a tort.

See also the following cases in support of the immunity of the sovereign:

Stanley v. Schwabky, 147 U. S. 508;

United States v. Clarke, 8 Pet. 436, 444;

Belnap v. Schild, 161 U. S. 10;

Kaivananako v. Polyblank, 205 U. S. 349;

The Schooner Exchange, 7 Cranch, 11 U. S. 116;

The Ricardo, 99 Fed. (2d) 935;

Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen,
43 Fed. (2d) 705, 708.

The Navemar, 303 U. S. 68, 82 L. Ed. 667, recognizes the doctrine of sovereign immunity as set forth and applicable to this case. However the District and Circuit Courts erred in its application of the principles of *The Navemar* case.

The courts below confused the ownership of a vessel with the operation and management thereof. Merely because a nation permits one of its corporations to operate its vessel does not change its right to the claim of sovereign immunity.

Questions closely akin to the present situation are contained in tax questions of property owned by the United States but operated by private corporations in various states in the development of war material. This court

has held such property exempt from *state taxation*. *U. S. v. County of Allegheny, Pennsylvania*, 88 L. Ed. 845.¹

The Supreme Court said (88 L. Ed. 852):

"We think, however, that the Government's property interests are not taxable either to it or to its

¹Mesta Machine Company, an appellant with the United States, exists as a corporation under the laws of Pennsylvania and has a manufacturing plant in the County of Allegheny, of that Commonwealth, the County being appellee herein. It is engaged in the manufacture of heavy machinery. In October, 1940, the War Department desired to produce a quantity of large field guns. *It could have assembled an organization, created a government-owned corporation, and erected a plant which would have been wholly tax immune.* *Clallam County v. United States*, 263 U. S. 341, 68 L. Ed. 328, *see* S. Ct. 121. But for reasons of time and policy it chose to utilize a going concern under private management and ownership. Mesta's plant was not equipped for the manufacture of ordnance. It was agreed that certain additional equipment specially required for the work should be furnished at Government cost and should remain the property of the United States.

The contract provided that title to all such property should vest in the Government upon delivery at the site of work and inspection and acceptance.

By the second title of the contract the Government leased this equipment to Mesta for the period during which guns are manufactured by it under this contract or later supplements. As rental Mesta agreed to pay the sum of one dollar. Liability of Mesta for loss, damage, or destruction of equipment was "that of a bailee under a mutual benefit bailment." Mesta could not remove any of it without permission, and at all times it was accessible to Government inspection. On termination of the gun-supply contract, unless a stand-by contract was made, Mesta agreed to remove and ship the equipment according to Government direction, in good condition subject to fair wear and tear and depreciation.

The Court further said in *United States v. County of Allegheny*, 88 L. Ed. 852:

"We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country."

bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. . . . In *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 S. Ct. 478, this Court decided that improvements made upon lands to which the United States held title but which were put in possession of Indians for their benefit remained immune from taxation and that cattle, horses, and chattels purchased with the money of the Government and 'put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them' were likewise immune from taxation."

The Navemar Case, 303 U. S.

The facts in this case are easily discernible from the case of *The Navemar* and therefore present a cogent question for this court to decide. In *The Navemar* case the libellant was a corporation created under the laws of Spain but was domiciled, so far as domicile is possible to a corporation, in the United States with its affairs directed and controlled by its agents resident in the United States. The Steamship *Navemar* was under the Spanish flag, being registered in the port of Seville, Spain, which was not at any of the times material in that case under the jurisdiction or control of the Madrid government. For a number of years the *Navemar* had been owned and operated by the libellant, at no time during the period material to that litigation being in any Spanish port or within any Spanish territorial waters. She was engaged in the transportation of commercial

cargoes between New York and South American ports pursuant to that charter.

While the Navemar was in Argentine waters on a voyage which she was making pursuant to her charter the Spanish consul at Rosario and at Buenos Aires, without the consent of the ship's owner or master, endorsed on two of the vessel's documents (not including the bill of sale or any document of title) a statement that the property in the vessel had passed to the Spanish government by a *decree* issued in Madrid on October 10th, 1935 by the President of Spain. This decree was *ex parte*. It was a decree of expropriation. There was no evidence in the record excepting the bare statement of the Spanish consul as to the effect of the Spanish decree even under the laws of Spain. [Record of Navemar Case, October Term 1937, No. 242.]

Contrast this with the case of the Baja California. The Baja California is owned by the Mexican government and title was and is at all times during matters pending herein in the government of Mexico. (2) The government of Mexico at all times retained absolute ownership in the vessel. [R. 40, 50.] All liabilities in the case are against the sovereign government of Mexico. Mexico has even indemnified the government of the United States in connection with any possible judgment. (4) The vessel was at all times mentioned herein in the government service of Mexico. It was obligated to carry out routes determined by the navy of Mexico. [R. 51.] (8) It was obligated to transport the mail, the army, the navy, and political officers. [R. 52.] It had at all times mentioned herein the port facilities of the government of Mexico. [R. 54, 55.]

The navigation service was at all times under the sovereign control of the Mexican government. [R. 58-60.] The ownership of the vessel remained at all times in the government of Mexico. [R. 69-72.] The object of the contract with public service [R. 58, 1], no exercise of private ownership over the ship or goods used in the service was violated. [R. 58, 59.] The government retained power to replace the management and business control of the ship which it permitted the management to operate only. [R. 60.] At any time that the vessel was not properly operated the government of Mexico retained the title and right to remove the management at all times.

The development in this country of the doctrine of immunity of foreign vessels stems from *The Exchange*, 7 Cranch. 116. The question there presented was whether a French war vessel was subject to the jurisdiction of our courts. It was held not to be upon the principle that a ship of a foreign friendly nation which constitutes a part of its military force, which is under the command of the sovereign and which is employed for obviously national purposes, should not be subject *in invitum* to interference by our courts. That was thought necessary if the sovereignty of a foreign friendly government was to be adequately and fully recognized. Where the vessel is one of war, all the elements of ownership, possession and direct operation by the foreign government are combined, and the national or public character of its functions is indisputable. But the notion of a public purpose has been extended and immunity granted though the vessel is commercially engaged. *Berrizi Bros. v. Pesaro*, 271 U. S. 562; *Carlo Poma*, 259 Fed. 369 (C. C. A. 2), *revid* on jurisdictional grounds, 255 U. S. 219; *The Maipo*,

252 Fed. 627 (D. N. Y.). In the *Pesaro* case the vessel was owned, possessed and operated by the Italian government in the carriage of merchandise for hire. The advancement of trade and the acquisition of revenue incident to participation in commercial services was deemed a sufficient public purpose. In England, the trend has been liberal (*The Jassy* (1906) P. 230; *The Porto Alexandre* (1920) P. 30) and the entire doctrine of immunity has been influenced by the theory that an action against the foreign vessel is not only *in rem* but also *in personam* against the foreign sovereign. *The Parlement Belge*, 5 P. D. 197. Inability to implead the foreign sovereign is singularly emphasized in *The Jupiter* (1924) P. 236.

One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flies and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign. *U. S. v. Rogers*, 150 U. S. 249; *The Scotland*, 105 U. S. 27; *Wilson v. McNamee*, 102 U. S. 574; *Crapo v. Kelly*, 83 U. S. 610; *E. B. Ward Jr.*, 17 Fed. 456 (C. C. La.)

The claim of the Mexican government of its ownership and public control of the *Baja* is borne out by the State Department and the concession of the libellant. The assertions of the State Department the courts are bound to accept as conclusive in this case. (*Oetjen v. Central Leather Co.*, 246 U. S. 297.)

Having title to the vessel and having dedicated it to the public service of Mexico, the government of Mexico must be regarded as immune from the processes of the American court.

Oetjen v. Central Leather Co., 246 U. S. 297;

The Adriatic, 258 Fed. 902 (C. C. A. 3);

Berizzi Bros. Co. v. Pesaro, 271 U. S. 562;

Briggs v. Light Boats, 11 Allen (Mass.) 157;

Hyde, International Law, Vol. 1, Sec. 256;

The Roserie, 254 Fed. 154 (D. N. J.);

The Parlement Belge, 5 P. D. 197;

See, Note, 31 *Columbia Law Review*, 660, 662;

The Jupiter (1924) P. 236;

Contra, The Attualita, 238 Fed. 909 (C. C. A. 4);

Long v. Tampico, 16 F. 491 (D. N. Y.);

Carlo Poma, 259 Fed. 369 (C. C. A. 2), rev'd on jurisdictional grounds, 255 U. S. 219;

The Beaverton, 273 F. 539 (D. N. Y.);

Cf. The Johnson Lighterage No. 24, 231 Fed. 365 (D. N. J.);

The Davis, 10 Wall. 15.

Justice Clarke quoted the doctrine in the following words in the *Oetjen* opinion, 246 U. S. 297, at page 303.
38 S. Ct. 309, 62 L. Ed. 726:

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of

such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

See also:

U. S. v. Belmont, 85 Fed. Rep. (2d) 543.

The Circuit Court of Appeals for the Ninth Circuit took the view that there was no "pertinent distinction between the position of a government which has acquired title but not possession of a vessel and that of a government owning a vessel, of which by contract it has surrendered possession to a private corporation which is acting independently in a private enterprise."

However, the true facts of the *Navemar* make the distinction apparent.

The "*Navemar*" was merely attempted to be appropriated by edict of the Spanish government. It was not within the sovereign domain of the Republic of Spain, nor otherwise within its possession or control. It was in nowise in the public service of Spain, nor under any obligation to be. The occurrence that gave rise to the libel took place outside Spanish waters. The Spanish government had by edict attempted to seize the ship, then within the sovereign domain of the United States and thereupon to claim immunity from suit in the courts of the United States. [Record of the "*Navemar*," No. 242, October Term 1937.]

But in the case at bar the title and ownership of the vessel was at all times in the government of Mexico. It was at the time of the occurrences giving rise to the libel action, in the territorial waters of Mexico (Mazatlan) and under the direction of the Portmaster of Mazatlan.

The operating contract expressly reserved ownership at all times in the government of Mexico and was subject to cancellation at any time for nonperformance of its express terms and statutes among other things, requiring the vessel to be in and perform the public service of Mexico. The term of the contract was five years with the government sharing half the profits. The government of Mexico had at all times *ownership, dominion and control*. There was no attempt to appropriate it by an executive, *ex parte* decree, as in the case of the "Navemar" nor is there any question of title.

The "Baja California" must therefore be considered, constructively at least, as a part of the floating territory of the government of Mexico, whose flag she flew, whose property she was, and is, and whose ownership has been recognized as having at all times existed. As such it was immune from process of the courts of the United States.

But the District Court erred in holding that because it appeared in the American court to assert its sovereign immunity of its floating territory that it thereby waived its claim of immunity. The Republic of Mexico and the United States of America have a treaty of friendship and general relations by the terms of which, among each other, there is granted to the envoys, ambassadors, ministers, charges d'affaires and other diplomatic agents of each other, the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the most favored nation.

Under this treaty it was entitled to make appearance in our courts to assert its jurisdiction and the lack of jurisdiction of the court below, and upon the estab-

lishment of ownership of the vessel in its government it was entitled to have a dismissal of the action below.

Changing governmental structures require new definitions to be given to old words and interpretations of sovereign immunity in the light of present day conditions.

The Republic of Mexico, our next ~~door~~ neighbor, and one of twenty-one nations of Latin America, in a friendly neighbor policy owns the vessel. This is conceded. It operates the vessel through one of its corporations—a creature of the State, and for a public purpose.

"Actual possession and custody of government property," says this court, "nearly always are in someone who is not himself the government, but acts in its behalf and for its purpose." *U. S. v. County of Allegheny*, 88 L. Ed. 853. As pointed out earlier in the case possession of government property is "always largely constructive."

But this does not relieve the doctrine of sovereign immunity. If this court should so hold, then the United States could not make claim for twenty-eight billion dollars worth of lend-lease material—owned by the United States but operated by others.

Another changed situation is State ownership of all property in some favored and friendly states. Our friendly ally, Russia, owns and possesses *all* property as a State. Under an identical situation, its ships would be state owned and operated. It could claim sovereign immunity while our friendly neighbor Mexico would be otherwise treated because of the operation of the ship by a corporation which can exist only in a democratic or free State. This interpretation of the law would put a penalty on democracy and on our friendly neighbors of

Latin America, and not give them the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the most favored nation.

In 1 Benedict on Admiralty (Fifth Edition) 296, it is said:

"As the foundation of jurisdiction *in rem* is the seizure of the property, jurisdiction is refused where such seizure by the courts of one sovereign is a dispossession of another sovereign and consequently contrary to the courtesy of kings, that comity of nations, that mutual deference and concession, by which amicable international relations are deemed best maintained. The public interest is thus preferred at some cost of inconvenience to individuals and of postponement of private rights."

It is respectfully submitted that the sovereign property of Mexico was immune from seizure and the court below was without jurisdiction to render the decree against this friendly neighbor.

Wherefore, Appellant, The Republic of Mexico, and The Steamship "Baja California," by the Republic of Mexico, its owner, pray that this Honorable Court grant certiorari and reverse the judgment.

Respectfully submitted,

MORRIS LAVINE,

*Proctor for the Republic of Mexico and the Steamship
"Baja California" by the Republic of Mexico, its
owner.*

RAOUL MAGAÑA,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 455.

THE REPUBLIC OF MEXICO AND THE STEAMSHIP "BAJA
CALIFORNIA" BY THE REPUBLIC OF MEXICO, AS
OWNER,

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

APPELLANTS' OPENING BRIEF.

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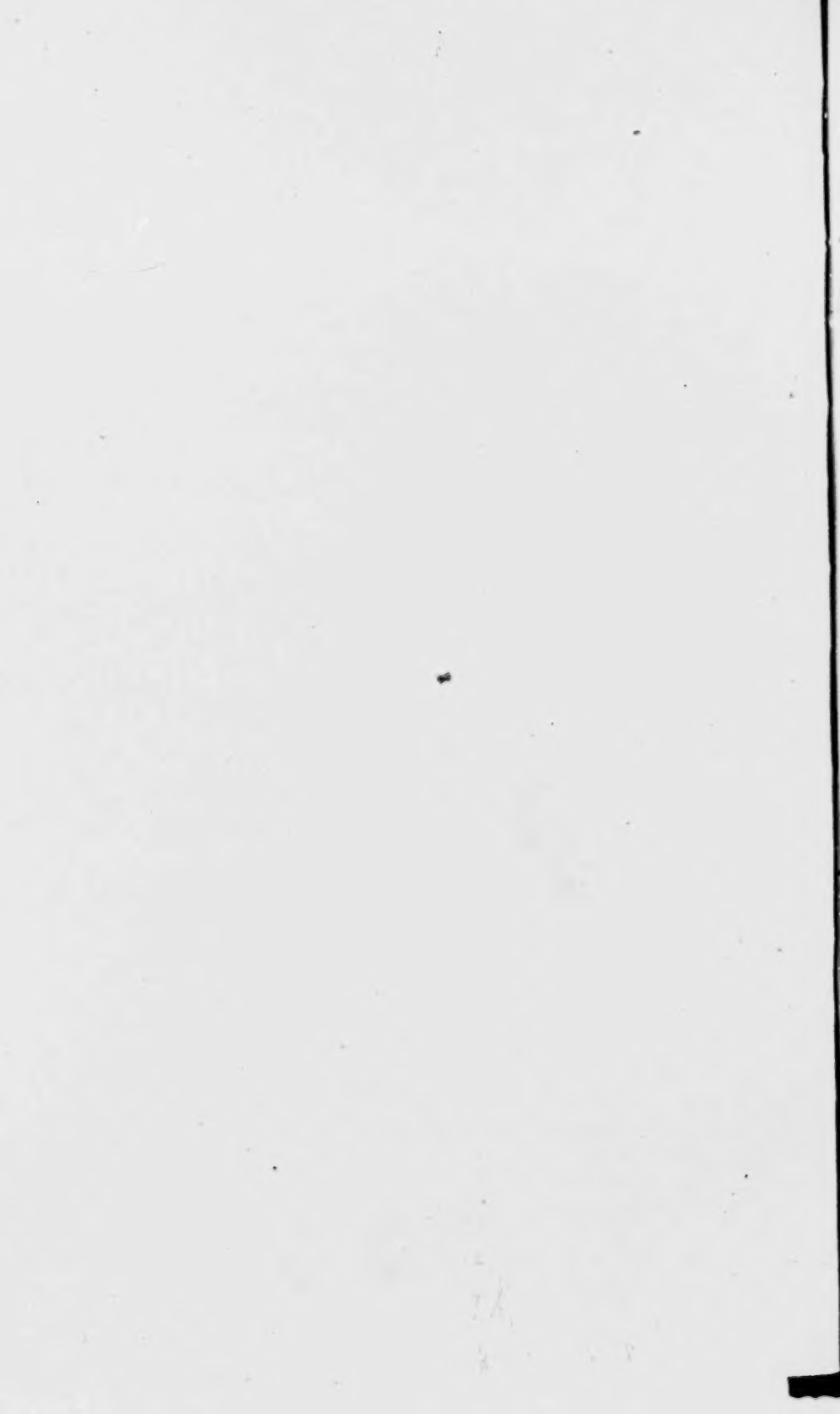
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TOPICAL INDEX.

	PAGE
Opinion below	1
Jurisdiction of this Court	1
Issues Presented by this appeal	8
Argument	10
The Navemar Case, 303 U. S.	18

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Belnap v. Schild, 161 U. S. 10.....	11, 16
Berizi Bros. Co. v. s/s Pesaro, 271 U. S. 562.....	12, 20, 21, 22
Briggs v. Light Boats, 11 Allen 157.....	22
Callam County v. United States, 263 U. S. 341, 68 L. Ed. 328, ee S. Ct. 121.....	17
Cf. The Johnson Lighterage No. 24, 231 Fed. 365.....	22
Carlo Poma, 259 Fed. 369, 255 U. S. 219.....	21
Carlo Poma, 259 Fed. 369	22
Contra, The Attualita, 238 Fed. 909.....	22
Crapo v. Kelly, 83 U. S. 610.....	21
Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 Fed. (2d) 705, 708.....	11, 16
E. B. Ward, Jr., 17 Fed. 456.....	21
Ex Parte Muir, 254 U. S. 522.....	13
Ex parte State of New York, 256 U. S. 503, 65 L. Ed. 1063..	15
Kawananakoa v. Polyblank, 205 U. S. 349.....	11, 16
Keokus v. United States, 260 U. S. 125.....	11, 16
Long v. Tampico, 16 Fed. 491.....	22
Miller v. Ferrocarril del Pacifico de Nicaragua, 18 A. (2d) 688	13
Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726	22
Stanley v. Schwalvy, 147 U. S. 508.....	11, 16
Sullivan v. State of Sao Paulo, 36 Fed. Supp. 503, 122 Fed. (2d) 355	13, 15
The Adriatic, 258 Fed 902.....	22
The Beaverton, 273 Fed. 539.....	22
The Davis, 10 Wall. 15.....	22
The Exchange, 7 Cranch 116.....	12, 20

CASES.

PAGE

The Jassy (1906), P. 230.....	21
The Jupiter (1924) P. 236.....	21, 22
The Maipo, 252 Fed. 627.....	21
The Maliakos, 41 Fed Supp. 697.....	15
The Navemar, 303 U. S. 68, 82 L. Ed. 667.....	5, 8, 16, 17, 25
The Parlement Belge, 5 P. D. 197.....	13, 21, 22
The Pesario, 225 U. S. 216.....	1
The Pesaro, 271 U. S. 562, 70 L. Ed. 1088.....	15
The Porto Alexandre (1920) P. 30.....	21
The Ricardo, 99 Fed. (2d) 935.....	11, 16
The Roseric, 254 Fed. 154.....	22
The Schooner Exchange, 7 Cranch, 11 U. S. 116.....	11, 16
The Scotland, 105 U. S. 27.....	21
The Siren, 7 Wall. 74 U. S. 152.....	11
The Western Maid, 257 U. S. 419.....	11
United States v. Belmont, 85 Fed. Rep. (2d) 543.....	23
United States v. Clarke, 8 Pet. 436.....	11
United States v. Clarke, 8 Pet. 436.....	16
United States v. County of Allegheny, Pennsylvania, 82 L. Ed 845, 88 L. Ed. 852.....	17, 25
United States v. Rogers, 150 U. S. 249.....	21
Wilson v. McNamee, 102 U. S. 574.....	21

STATUTES.

United States Codes Annotated, Title 28, Section 347.....	1
United States Constitution, Article II, Section 2, Clause 1.....	1

TEXTBOOKS.

1 Benedict on Admiralty (Fifth Edition) 296.....	26
Columbia Law Review, see, note, 660,.....	22
Hyde, International Law, Vol. 1, Sec. 250.....	22

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 455.

THE REPUBLIC OF MEXICO AND THE STEAMSHIP "BAJA CALIFORNIA" BY THE REPUBLIC OF MEXICO, AS OWNER,

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

APPELLANTS' OPENING BRIEF.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Opinion Below.

The opinion below is reported in 143 Fed. (2d) 854.

Jurisdiction of This Court.

Jurisdiction is conferred upon this Court by Title 28, Section 347 United States Codes Annotated, Article III, Section 2, Clause 1, U. S. Constitution. The decision of the Circuit Court of Appeals for the Ninth Circuit dated June 30, 1944, was a final decision. "The Pesario," 225 U. S. 216.

The District Court of the United States, Southern District of California, Central Division, had assumed or acquired jurisdiction of the Steamship "Baja California."

a vessel owned by the Republic of Mexico, where a fire occurred in Mexican waters in the harbor of Mazatlan, and as a result of maneuvers growing out of the fire which subsequently occurred, the appellee's ship was damaged and later sunk.

Short Statement of the Case.

The Republic of Mexico owns the Steamship "Baja California." They are the appellants herein. The Steamship "Baja California" is operated by the C.I.A. Mexicana de Navigacion del Pacifico S. de R. I. This company, a Mexican company, has a contract for the management and business operation of the "Baja California" for five years. [R. 48, 60.] The Mexican Government receives 50% of the distributable profits. [R. 61.] Title remains at all times in the Republic of Mexico. The ship is bound to and must carry on public service for the Government of Mexico or forfeit its contract to the Mexican Government, and the Mexican Government retains ownership at all times. [R. 58.]

During the month of October 1941, the "Lottie Carson," a vessel of 234 tons net, which was fitted for fishing for sharks, and which was owned by R. B. Hoffman, had gone to the harbor of Mazatlan, Mexico, for the purpose of fishing for sharks. During the morning of October 19th, the "Lottie Carson" was lying at anchor in the harbor. The Steamship "Campeche" which was also lying at anchor in the harbor of Mazatlan, farther out and in a southeasterly direction from the "Lottie Carson," caught fire at about eleven o'clock in the morning. The keeper of the port of Mazatlan, having taken control of the situation, ordered the "Baja California," a vessel of about 575 tons, to tow the "Campeche" into the harbor,

which it proceeded to do. During the course of the towing operations the "Campeche" went adrift, as a result of which the rudder of the "Campeche" struck the "Lottie Carson" on her port side, severely damaging the latter ship and cutting a hole in the planking of her side below the water line, resulting in the sinking of the "Lottie Carson." It was claimed that the "Baja California" was at fault, the libelant asserting that the "Baja California" let go the tow line which held the "Campeche." This was denied by the "Baja California."

All of these events took place within the port of Mazatlan, Mexico, within the three-mile limit of the shores of Mexico.

On December 14, 1941, R. B. Hoffman filed a libel, No. 1961 B. H. in the District Court of the United States for the Southern District of California, Central Division, against the Mexican Government-owned steamship "Baja California," which steamship was then in the friendly port of San Pedro, California, in Los Angeles Harbor. The libel was issued upon the steamer and it was arrested and taken into possession by the Marshal of the Court in the Harbor of Los Angeles. [R. 2-16, incl.]

On December 24, 1941, the Ambassador to the United States for the Republic of Mexico, Dr. Nejara, filed a suggestion by special appearance showing that the said steamship was at all times mentioned in the libel *owned* by the Republic of Mexico. [R. 19-21.]

On April 8, 1942, the Department of State transmitted to the court its statement that it accepted as true that the "vessel is the property of the Mexican State." [R. 147-162.] This was accompanied by a suggestion from the Ambassador of Mexico, not only that the vessel was the

property of the State, but that the occurrences took place in the port of Mazatlan, which would be close to the witnesses and the scene of the occurrences. Nevertheless, in the face of these statements and suggestions by the Mexican Government and declaration of the Department of State, the trial court assumed and asserted jurisdiction and proceeded against the Mexican Sovereign Government and the ship to judgment.

At the beginning of the proceedings in the District Court the Government of Mexico objected to the jurisdiction of the court and claimed its sovereign immunity for the "Baja California." This claim of sovereign immunity was denied by Judge Paul J. McCormick, who first passed upon the matter. Thereafter the case came on for trial before Judge Ben Harrison, who declined to consider the claim of sovereign immunity for the reason that it had been passed on and denied by Judge McCormick. The case then went to trial, the Government of Mexico at all times reserving its claim of sovereign immunity for the vessel which it owned.

On January 28, 1942, the United States Attorney for the Southern District of California, acting under the direction of the Attorney General of the United States, "as a matter of comity between the United States Government and the Government of Mexico for such consideration as this Court may deem necessary and proper" filed a Suggestion [R. 32] transmitting a Note of the Mexican Ambassador. The Note stated that the "Baja California" was owned by the Republic of Mexico. Libellant

filed a Statement of His Position in response to this Suggestion and, *inter alia*, expressly submitted that the suggestion did not constitute a recognition and allowance by the State Department of the claim of sovereign immunity. [R. 39.] An immediate hearing was then had on the issue of sovereign immunity. [R. 45.] This hearing was based on a stipulation as to the facts [R. 25] and on documentary evidence, consisting principally of the contract under which the "Baja California" was being operated by the Mexican corporation [R. 48], certain articles of Mexican law dealing with "general lines of communication" [R. 83] and various certificates attesting the authority of the Mexican Government and the Mexican Ambassador and the registration of the steamer. [R. 64-71.] This evidence shows, as we shall point out more particularly later, that the "Baja California" was owned by the Republic of Mexico.

On February 13, 1942, District Judge Paul J. McCormick made an order holding that under the rule of *The Navemar* (303 U. S. 68), no ground had been shown for ousting the jurisdiction of the District Court, respectfully declining the Suggestion of the Republic of Mexico and ordering that the "Baja California" remain in the custody of the United States Marshal until the further order of the Court. [R. 129.]

The Republic of Mexico on March 30, 1942, filed an answer to the libel [R. 132] and two claims, one in the usual admiralty form [R. 142], the second a special claim asserting sovereign immunity. [R. 143.]

On April 8, 1942, a second "Suggestion" was filed by the United States Attorney [R. 147] transmitting a Note from the Mexican Ambassador, stating in effect that if the vessel should be released, the Mexican Government would meet any liability that might be declared "Directly against it should the courts decide that execution may be had against the vessel." [R. 160.] This Suggestion, like the first, was presented as a matter of comity "for such consideration as the Court may deem necessary and proper." The State Department this time accepted as true the statement that the vessel is the property of the Mexican state. This (the ownership), as Mr. Welles stated, was conceded by libelant at the January hearing. [R. 149.] Libelant filed a reply to this Suggestion pointing out that if the vessel were released without a bond the District Court would have no jurisdiction to proceed further, and respectfully declining to accept the Mexican Government's proposal. [R. 165.] Libelant renewed his offer to accept a bond without prejudice to the claim of sovereign immunity, but the Republic of Mexico rejected this offer. [R. 177.]

The case then went to trial on the merits, before District Judge Ben Harrison, May 6, May 13 and May 14, 1942, the Government of Mexico reserving its claim of sovereign immunity at all times. Witnesses were called and examined by both sides and documentary evidence was introduced. During the trial counsel for the Republic of Mexico stated in answer to an inquiry from the Court, that the Mexican Government had no additional evidence to submit on the issue of sovereign immunity. [Stipulation, R. 225.] The Court declined to recognize the Mexican ownership of the vessel as granting sovereign immunity. It filed a memorandum opinion [R. 185] hold-

ing the "Baja California" solely at fault for the collision and the loss of the "Lottie Carson." The Court held that in the absence of any additional evidence or a showing of extraordinary circumstances calling for a review of the question of sovereign immunity, the ruling of Judge McCormick on that subject was the law of the case. [R. 189.]

Findings of fact and conclusions of law were filed July 31, 1942, and the same day an interlocutory decree and order of reference was made. [R. 201.] A reference was duly had to determine the amount of damage.

The District Court made a final decree on December 12, 1942 [R. 203], ordering a recovery in favor of libellant for the damages, interest and costs and directing a sale of the vessel to satisfy the decree. Before the sale took place, however, the Republic of Mexico filed a petition for and obtained an allowance of an appeal, and obtained the release of the vessel by making a cash deposit in lieu of a supersedeas bond. [R. 213.]

The Circuit Court of Appeals for the Ninth Circuit affirmed the District Court's decree, June 30, 1944. [R. 251.] A petition for rehearing was denied August 4, 1944. [R. 252.]

The Republic of Mexico then filed its petition for certiorari in this Court, which this Court granted.

During the course of the trial the State Department of the United States submitted a suggestion that the ownership of the vessel was in the Government of Mexico, and this was conceded by the appellee. The Government of Mexico also guaranteed to be bound by and to meet any liability which might be declared against the vessel which it owns. [R. 149.]

The trial court rendered judgment against the Republic of Mexico and the "Baja California" in the sum of \$81,700.05 damages, with interest, and costs in the sum of \$4,625.29, as of December 12, 1942. [R. 208.]

An appeal was taken from the judgment of the District Court of the United States to the Ninth Circuit Court of Appeals, which affirmed the judgment on the basis of this Court's decision in the case of *The Navemar*, 303 U. S. 68, 82 L. Ed. 667.

The Government of Mexico has at all times reserved its claim of sovereign immunity and its right not to have it impleaded in a trial in the United States.

Issues Presented by This Appeal.

1. Where a friendly foreign government, to-wit, the Government of Mexico, owns a vessel and the title to the same, and allows one of its corporations to operate it for five years, are that nation and that vessel covered by the doctrine of sovereign immunity?

2. May a vessel owned by a foreign government, holding title to that vessel and exercising dominion over it be the subject of an action *in rem* in the District Court of the United States?

3. Does the District Court of the United States have jurisdiction of a foreign government and its property, to-wit, a ship, when it anchors in a port of the United States, to libel and seize that ship for an accident happening in its own territorial waters and its own port?

4. Where title and dominion to a ship are in a friendly foreign power, and it is *in the public service of that country* but is operated by a corporation under what might be termed a "lend-leasing contract" for five years, is the

ship subject to libel in a court of the United States, even though absolute ownership is in the government of the friendly nation itself?

5. Must the District Court of the United States accept as true the finding of fact of the Secretary of State that the vessel is owned by a friendly foreign power, and on the basis of this finding alone dismiss the action for want of jurisdiction?

6. Did the District Court err in refusing to reconsider the question of sovereign immunity after the State Department recognized the ownership of the vessel as the Government of Mexico in an appropriate suggestion to the Court.

7. Does a friendly foreign government waive its sovereign immunity by answering in a court of the United States on the merits, during which at all times it preserves the challenge to the jurisdiction of the court for want of sovereign immunity?

Argument.

The Republic of Mexico owns the vessel "Baja California." This was conceded by the appellee, and it was established as a fact in the District Court of the United States. The Republic of Mexico appeared in court with the proper claim to ownership and title in the vessel. [R. 142, 143.]

Sumner Welles, Acting Secretary of the Department of State, informed the District Court:

"The Department accepts as true the statement that the vessel is the property of the Mexican State. This appears also to have been accepted by proctors for the libelant, as shown by paragraph (4) of the attached copy of a document which apparently was submitted to the court by them under the heading 'Analysis of the Note of the Honorable F. Castillo Najera.'" [R. 149.]

The Republic of Mexico correctly stated its position and the law relative to the case, and the District Court erred in not accepting it. Its position was expressed as follows:

"It is my Government's contention that, upon acceptance by the libelant of my Government's ownership of the vessel 'Baja California,' all *in rem* proceedings should have ended. Their continuation by the United States District Court was tantamount to placing my Government in the position of a party defendant in a legal action. In this respect, my Government contends that it is a rule of International Law—established beyond dispute—that the courts of a country are not empowered to implead a foreign sovereign." [R. 158.]

This is the doctrine of *The Siren*, 7 Wall. 74 U. S. 152, which holds that the sovereign cannot be sued without his consent. The same exception extends to his property, and a claim *in rem* cannot be forced against the sovereign whose property is immune from seizure.

In "*The Western Maid*," 257 U. S. 419-433, it is held that the personality of a public vessel is merged in that of the sovereign. Therefore the immunity of a sovereign inheres in his public vessel.

In *Keokus v. United States*, 260 U. S. 125, it is held that sovereign property is exempt from seizure for a tort.

See also the following cases in support of the immunity of the sovereign:

Stanley v. Schickelzy, 147 U. S. 508;

United States v. Clarke, 8 Pet. 436, 444;

Belnap v. Schild, 161 U. S. 10;

Kawananakoa v. Polyblank, 205 U. S. 349;

The Schooner Exchange, 7 Cranch, 11 U. S. 116;

The Ricardo, 99 Fed. (2d) 935;

Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen,
43 Fed. (2d) 705, 708.

A friendly foreign sovereign power is entitled to immunity from suits in the courts of another country, even in times not as extraordinary as the present. A friendly foreign power is entitled to plead its immunity from suit as a matter of right, and the court has in fact no jurisdiction to entertain an action against it. This principle is as applicable in the case of a merchant vessel owned by such sovereign power as it is to a war ship.

In *Berizzi Bros Co. v. s/s Pesaro*, 271 U. S. 562, this Court said, at page 574:

"We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

In the *Pesaro* case the Court approved the doctrine which it had theretofore expressed, through Chief Justice Marshall, in *The Exchange*, 7 Cranch 116, that a foreign sovereign is entitled to immunity from suit in our courts as a matter of right. While in that case a public armed ship was involved, *The Pesaro, supra*, shows that the same principle applies to all ships owned by foreign sovereigns. In *The Exchange*, Chief Justice Marshall said, at page 147:

"If the preceding reasoning be correct, the *Exchange*, being a public armed ship, in the service of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."

To the same effect is *The Parlement Belge*, 5 P. D. 197.

See also: *Ex Parte Muir*, 254 U. S. 522; *The Nave-mar* (2 C. C. A.) 102 Fed. (2d) 444; *Sullivan v. State of Sao Paulo* (2 C. C. A.) 122 Fed. (2d) 355. In the latter case, consideration was given to the question of the significance to be attributed to the actions of the State Department and the District Attorney in recognizing and allowing the claim of immunity of a constituent state of the United States of Brazil, and the Court held (p. 357):

"Evidently some favorable implication must be drawn, for sometimes the Department has declined to act at all, as in *Compania Espanola v. The Nave-mar*, *supra*, and *Molina v. Commission Reguladora*, 91 N. J. L. 382, 103 A. 397, and has even positively expressed itself as opposed to a claim of immunity. *The Pesaro*, D. C. S. D. N. Y., 277 F. 473."

On the authority of *Miller v. Ferrocarril del Pacifico de Nicaragua*, 18 A. (2d) 688, the Court further held (in the *Sullivan* case) that the test of the attitude of the Executive Department through the State Department toward the validity of a claim of sovereign immunity or its recognition and allowance should be supplied by the Executive's representations and not by the technical nature of its appearance. The Court there said, page 357:

"Here the Executive chose to transmit the claim, which act alone has been held to be an implied recognition.

"And when pressed, it did much more. It not only vouched for the accuracy of the statements of fact made by the Brazilian Ambassador, but also declared it to be the view of the Department that the interest

of the Government of Brazil in the funds, as explained in the Brazilian Ambassador's note of July 11, 1940, is of such character as to entitle them to immunity from attachment by private litigants.' This appears to be a clear recognition of the claim of the Brazilian federal government so far as the Department is concerned"

The Court continued, on the same page:

"We have no hesitation, therefore, in accepting these communications as the official representation of Executive acceptance of the Ambassador's claims. And therefore we accept for the purposes of decision herein the recitals of fact made by the Ambassador. Compare *Banco de Espana v. Federal Reserve Bank*, 2 Cir., 114 F. (2d) 438, 443. . . .

"Courts will undoubtedly accept as conclusive Executive pronouncements on whatever might be considered a 'political,' as opposed to a 'judicial,' question, *Doe ex dem. Clark v. Braden*, 16 How. 635, 57 U. S. 635, 14 L. Ed. 1090, including the question whether one is a sovereign, *Oetjen v. Central Leather Co.*, 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726; *Duff Development Co. v. Kelantan Government* (1924) A. C. 797, and the question whether one is a sovereign's privileged diplomatic representative. *United States v. Ortega*, C. C. E. D. Pa., Fed. Cas. No. 15,971; *Engelke v. Musmann* (1928) A. C. 433; see *Ex parte Baiz*, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222. Such questions as these must have been within the contemplation of the court in the *Navemar* case, when it said (303 U. S. page 74, 58 S. Ct. page 434, 82 L. Ed. 667): 'If the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to re-

lease the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction." See *Deak, supra*, 40 Col. L. Rev. at page 462. For Executive action in respect to such questions, if not actually determinative of them, is at least the best evidence which it is possible to adduce. *United States v. Liddle*, C. C. E. D. Pa., Fed. Cas. No. 15,598."

Learned Hand, C. J. in a separate concurring opinion, said, at page 360:

"I can think of no rationale which will reconcile these doctrines except that the violation of a foreign state's possession is so grave an indignity as *ipso facto* to embarrass the relations between that state and the state of the forum; it is better that the wrongs of the court's nationals should be left to negotiation between the powers."

See also the following cases: *The Maliakos*, 41 Fed. Supp. 697; *Ex parte State of New York*, 256 U. S. 503, 65 L. Ed. 1063; *The Pesaro*, 271 U. S. 562, 70 L. Ed. 1088; *Sullivan v. State of Sao Paulo*, 36 Fed. Supp. 503, affirmed in 122 Fed. (2d) 355.

In the present case the District Court sought to deprive the friendly foreign sovereign, Mexico, of the right to maintain its dignity by granting sovereign immunity from the suit, and the second judge declined to review that decision.

This was error, since the State Department, by appropriate suggestion to the trial judge, recognized the ownership of the vessel as our friendly neighbor, the Government of Mexico.

In *Keokus v. United States*, 260 U. S. 125, it is held that sovereign property is exempt from seizure for a tort.

See also the following cases in support of the immunity of the sovereign:

Stanley v. Schwalby, 147 U. S. 508;

United States v. Clarke, 8 Pet. 436, 444;

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Dexter & Carpenter v. Kunglig Järnvägsstyrelsen,
43 Fed. (2d) 705, 708.

The Navemar, 303 U. S. 68, 82 L. Ed. 667, recognizes the doctrine of sovereign immunity as set forth and applicable to this case. However the District and Circuit Courts erred in its application of the principles of *The Navemar* case.

The courts below confused the ownership of a vessel with the operation and management thereof. Merely because a nation permits one of its corporations to operate its vessel does not change its right to the claim of sovereign immunity.

Questions closely akin to the present situation are contained in tax questions of property owned by the United States but operated by private corporations in various states in the development of war material. This court

has held such property exempt from *state taxation*. *U. S. v. County of Allegheny, Pennsylvania*, 82 L. Ed. 845.¹

The Supreme Court said (88 L. Ed. 852):

"We think, however, that the Government's property interests are not taxable either to it or to its

¹Mesta Machine Company, an appellant with the United States, exists as a corporation under the laws of Pennsylvania and has a manufacturing plant in the County of Allegheny, of that Commonwealth, the County being appellee herein. It is engaged in the manufacture of heavy machinery. In October, 1940, the War Department desired to produce a quantity of large field guns. It could have assembled an organization, created a government-owned corporation, and erected a plant which would have been wholly tax immune. *Clallum County v. United States*, 263 U. S. 341, 68 L. Ed. 328, 68 S. Ct. 121. But for reasons of time and policy it chose to utilize a going concern under private management and ownership. Mesta's plant was not equipped for the manufacture of ordnance. It was agreed that certain additional equipment specially required for the work should be furnished at Government cost and should remain the property of the United States.

The contract provided that title to all such property should vest in the Government upon delivery at the site of work and inspection and acceptance.

By the second title of the contract the Government leased this equipment to Mesta for the period during which guns are manufactured by it under this contract or later supplements. As rental Mesta agreed to pay the sum of one dollar. Liability of Mesta for loss, damage, or destruction of equipment was "that of a bailee under a mutual benefit bailment." Mesta could not remove any of it without permission, and at all times it was accessible to Government inspection. On termination of the gun-supply contract, unless a stand-by contract was made, Mesta agreed to remove and ship the equipment according to Government direction, in good condition subject to fair wear and tear and depreciation.

The Court further said in *United States v. County of Allegheny*, 88 L. Ed. 852:

"We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country."

bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. . . . In *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 S. Ct. 478, this Court decided that improvements made upon lands to which the United States held title but which were put in possession of Indians for their benefit remained immune from taxation and that cattle, horses, and chattels purchased with the money of the Government and 'put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them' were likewise immune from taxation."

The Navamar Case, 303 U. S.

The facts in this case are easily discernible from the case of *The Navemar* and therefore present a cogent question for this court to decide. In *The Navemar* case the libellant was a corporation created under the laws of Spain but was domiciled, as far as domicile is possible to a corporation, in the United States with its affairs directed and controlled by its agents resident in the United States. The Steamship Navemar was under the Spanish flag, being registered in the port of Seville, Spain, which was not at any of the times material in that case under the jurisdiction or control of the Madrid government. For a number of years the Navemar had been owned and operated by the libellant, at no time during the period material to that litigation being in any Spanish port or within any Spanish territorial waters. She was engaged in the transportation of commercial cargoes between New York and South American ports pursuant to that charter.

While the Navemar was in Argentine waters on a voyage which she was making pursuant to her charter the Spanish consul at Rosario and at Buenos Aires, without the consent of the ship's owner or master, endorsed on two of the vessel's documents (not including the bill of sale or any document of title) a statement that the property in the vessel had passed to the Spanish government by a decree issued in Madrid on October 10th, 1935, by the President of Spain. This decree was *ex parte*. It was a decree of expropriation. There was no evidence in the record excepting the bare statement of the Spanish consul as to the effect of the Spanish decree even under the laws of Spain. [Record of Navemar Case, October Term 1937, No. 242.]

Contrast this with the case of the Baja California. The Baja California is owned by the Mexican government and title was and is at all times during matters pending herein in the government of Mexico. (2) The government of Mexico at all times retained absolute ownership in the vessel. [R. 40, 50.] All liabilities in the case are against the sovereign government of Mexico. Mexico has even indemnified the government of the United States in connection with any possible judgment. (4) The vessel was at all times mentioned herein in the government service of Mexico. It was obligated to carry out routes determined by the navy of Mexico. [R. 51.] (8) It was obligated to transport the mail, the army, the navy, and political officers. [R. 52.] It had at all times mentioned herein the port facilities of the government of Mexico. [R. 54, 55.] The navigation service was at all times under the sovereign control of the Mexican government. [R.

58-60.] The ownership of the vessel remained at all times in the government of Mexico. [R. 69-72.] The object of the contract with public service [R. 58, 1], no exercise of private ownership over the ship or goods used in the service was violated. [R. 58, 59.] The government retained power to replace the management and business control of the ship which it permitted the management to operate only. [R. 60.] At any time that the vessel was not properly operated the government of Mexico retained the title and right to remove the management at all times.

The development in this country of the doctrine of immunity of foreign vessels stems from *The Exchange*, 7 Cranch. 116. The question there presented was whether a French war vessel was subject to the jurisdiction of our courts. It was held not to be upon the principle that a ship of a foreign friendly nation which constitutes a part of its military force, which is under the command of the sovereign and which is employed for obviously national purposes, should not be subject *in incitum* to interference by our courts. That was thought necessary if the sovereignty of a foreign friendly government was to be adequately and fully recognized. Where the vessel is one of war, all the elements of ownership, possession and direct operation by the foreign government are combined, and the national or public character of its functions is indisputable. But the notion of a public purpose has been extended and immunity granted though the vessel is commercially engaged. *Berrizi Bros. v. Pesaro*, 271

U. S. 562; *Carlo Poma*, 259 Fed. 369 (C. C. A. 2), rev'd on jurisdictional grounds, 255 U. S. 219; *The Maipo*, 252 Fed. 627 (D. N. Y.). In the *Pesaro* case the vessel was owned, possessed and operated by the Italian government in the carriage of merchandise for hire. The advancement of trade and the acquisition of revenue incident to participation in commercial services was deemed a sufficient public purpose. In England, the trend has been liberal (*The Jassy* (1906) P. 230; *The Porto Alexandre* (1920) P. 30) and the entire doctrine of immunity has been influenced by the theory that an action against the foreign vessel is not only *in rem* but also *in personam* against the foreign sovereign. *The Parlement Belge*, 5 P. D. 197. Inability to implead the foreign sovereign is singularly emphasized in *The Jupiter* (1924) P. 236.

One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flies and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign. ● *U. S. v. Rogers*, 150 U. S. 249; *The Scotland*, 105 U. S. 27; *Wilson v. McNamee*, 102 U. S. 574; *Crapo v. Kelly*, 83 U. S. 610; *E. B. Ward Jr.*, 17 Fed. 456 (C. C. La.)

The claim of the Mexican government of its ownership and public control of the Baja is borne out by the State Department and the concession of the libellant. The assertions of the State Department the courts are bound to

accept as conclusive in this case. (*Oetjen v. Central Leather Co.*, 246 U. S. 297.)

Having title to the vessel and having dedicated it to the public service of Mexico, the government of Mexico must be regarded as immune from the processes of the American court.

- Oetjen v. Central Leather Co.*, 246 U. S. 297;
The Adriatic, 258 Fed. 902 (C. C. A. 3);
Berizzi Bros. Co. v. Pesaro, 271 U. S. 562;
Briggs v. Light Boats, 11 Allen (Mass.) 157;
Hyde, International Law, Vol. 1, Sec. 256;
The Roseric, 254 Fed. 154 (D. N. J.);
The Parlement Belge, 5 P. D. 197;
See, Note, 31 *Columbia Law Review*, 660, 662;
The Jupiter (1924) P. 236;
Contra, The Attualita, 238 Fed. 909 (C. C. A. 4);
Long v. Tampico, 16 F. 491 (D. N. Y.);
Carlo Poma, 259 Fed. 369 (C. C. A. 2), rev'd on
jurisdictional grounds, 255 U. S. 219;
The Beaverton, 273 F. 539 (D. N. Y.);
Cf. The Johnson Lighterage No. 21, 231 Fed. 365
(D. N. J.);
The Davis, 10 Wall. 15.

Justice Clarke quoted the doctrine in the following words in the *Oetjen* opinion, 246 U. S. 297, at page 303.
38 S. Ct. 309, 62 L. Ed. 726:

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

See, also:

U. S. v. Belmont, 85 Fed. Rep. (2d) 543.

The Circuit Court of Appeals for the Ninth Circuit took the view that there was no "pertinent distinction between the position of a government which has acquired title but not possession of a vessel and that of a government owning a vessel, of which by contract it has surrendered possession to a private corporation which is acting independently in a private enterprise."

However, the true facts of the *Navemar* make the distinction apparent.

The "*Navemar*" was merely attempted to be appropriated by edict of the Spanish government. It was not within the sovereign domain of the Republic of Spain, nor otherwise within its possession or *control*. It was in nowise in the public service of Spain, nor under any obligation to be. The occurrence that gave rise to the libel took place outside Spanish waters. The Spanish government had by edict attempted to seize the ship, then within the sovereign domain of the United States and thereupon to claim immunity from suit in the courts of the United States. [Record of the "*Navemar*," No. 242, October Term, 1937.]

But in the case at bar the title and ownership of the vessel was at all times in the government of Mexico. It was at the time of the occurrences giving rise to the libel action, in the territorial waters of Mexico (Mazatlan) and under the direction of the Portmaster of Mazatlan. The operating contract expressly reserved ownership at all times in the government of Mexico and was subject to cancellation at any time for nonperformance of its express terms and statutes among other things, requiring

the vessel to be in and perform the public service of Mexico. The term of the contract was five years with the government sharing half the profits. The government of Mexico had at all times *ownership, dominion and control*. There was no attempt to appropriate it by an executive, *ex parte* decree, as in the case of the "Navemar" nor is there any question of title.

The "Baja California" must therefore be considered, constructively at least, as a part of the floating territory of the government of Mexico, whose flag she flew, whose property she was, and is, and whose ownership has been recognized as having at all times existed. As such it was immune from process of the courts of the United States.

But the District Court erred in holding that because it appeared in the American court to assert its sovereign immunity of its floating territory that it thereby waived its claim of immunity. The Republic of Mexico and the United States of America have a treaty of friendship and general relations by the terms of which, among each other, there is granted to the envoys, ambassadors, ministers, charges d'affaires and other diplomatic agents of each other, the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the most favored nation.

Under this treaty it was entitled to make appearance in our courts to assert its jurisdiction and the lack of jurisdiction of the court below, and upon the establishment of ownership of the vessel in its government it was entitled to have a dismissal of the action below.

Changing governmental structures require new definitions to be given to old words and interpretations of

sovereign immunity in the light of present day conditions.

The Republic of Mexico, our next door neighbor, and one of twenty-one nations of Latin America, in a friendly neighbor policy owns the vessel. This is conceded. It operates the vessel through one of its corporations—a creature of the State, and for a public purpose.

“Actual possession and custody of government property,” says this court, “nearly always are in someone who is not himself the government, but acts in its behalf and for its purpose.” *U. S. v. County of Allegheny*, 88 L. Ed. 853. As pointed out earlier in the case possession of government property is “always largely constructive.”

But this does not relieve the doctrine of sovereign immunity. If this court should so hold, then the United States could not make claim for twenty-eight billion dollars worth of lend-lease material—owned by the United States but operated by others.

Another changed situation is State ownership of all property in some favored and friendly states. Our friendly ally, Russia, owns and possesses all property as a State. Under an identical situation, its ships would be state owned and operated. It could claim sovereign immunity while our friendly neighbor Mexico would be otherwise treated because of the operation of the ship by a corporation which can exist only in a democratic or free State. This interpretation of the law would put a penalty on democracy and on our friendly neighbors of Latin America, and not give them the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the more favored nation.

In 1 Benedict on Admiralty (Fifth Edition) 296, it is said:

"As the foundation of jurisdiction *in rem* is the seizure of the property, jurisdiction is refused where such seizure by the courts of one sovereign is a dispossession of another sovereign and consequently contrary to the courtesy of kings, that comity of nations, that mutual deference and concession, by which amicable international relations are deemed best maintained. The public interest is thus preferred at some cost of inconvenience to individuals and of postponement of private rights."

It is respectfully submitted that the sovereign property of Mexico was immune from seizure and the court below was without jurisdiction to render the decree against this friendly neighbor.

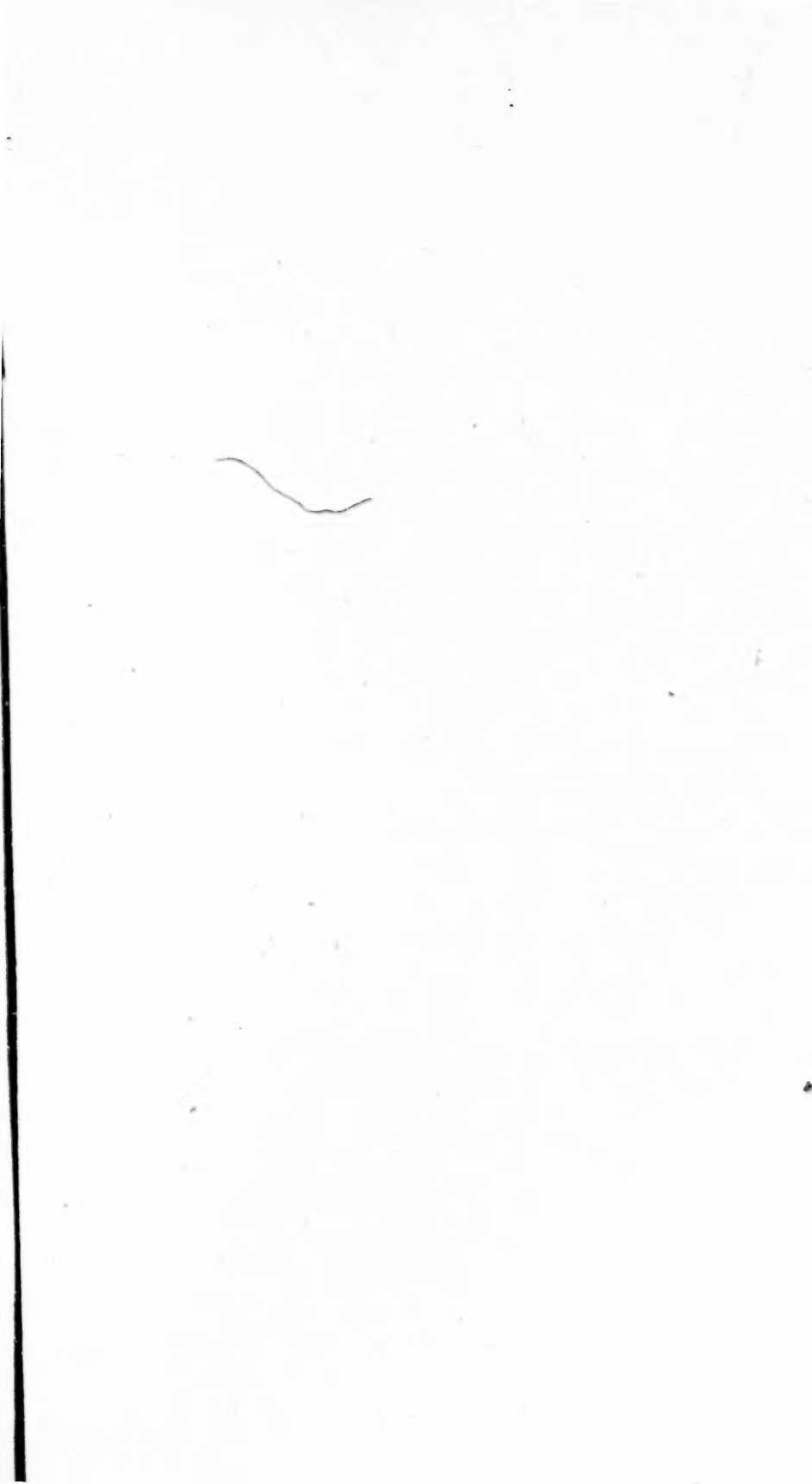
Wherefore, the friendly foreign government, the Republic of Mexico, one of our allies in the struggle for freedom, and the owner of the Steamship "Baja California," prays that this Honorable Court reverse the judgment.

Respectfully submitted,

MORRIS LAVINE.

*Proctor for the Republic of Mexico and the Steamship
"Baja California" by the Republic of Mexico, its
owner.*

RAOUL MAGAÑA,
Of Counsel.



FILE COPY

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CHARLES ELMORE DROPLEY
CLERK

IN THE
Supreme Court of the United States

October Term, 1943
No. 455.

THE REPUBLIC OF MEXICO and
THE STEAMSHIP "BAJA CALIFORNIA" by the Republic
of Mexico, as Owner,

Petitioners,

vs.

R. B. HOFFMAN,

Respondent.

**BRIEF OF RESPONDENT R. B. HOFFMAN IN
OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI.**

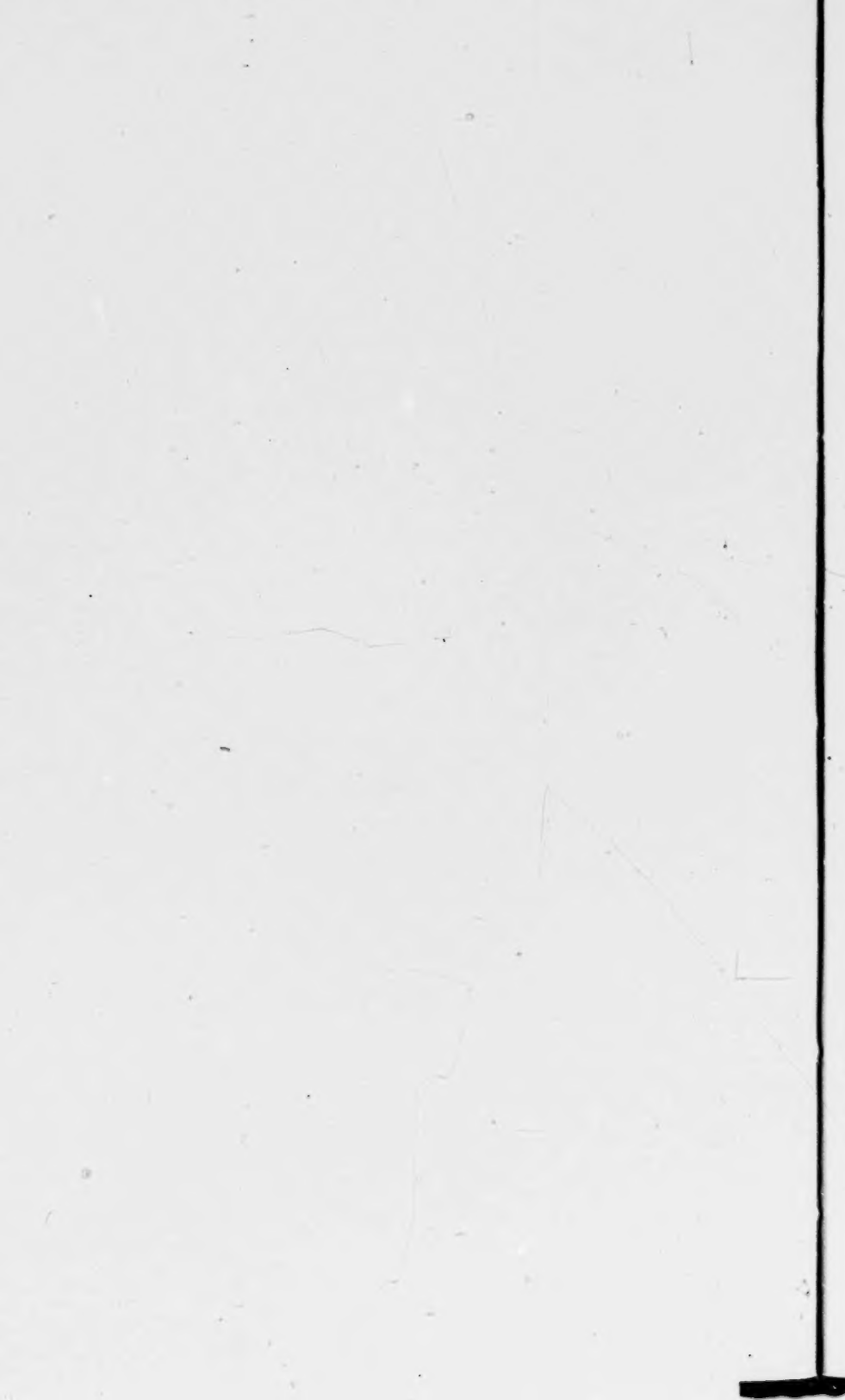
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SUBJECT INDEX.

	PAGE
Opinions below	1
Jurisdictional statement	2
Statement of the case	2
Summary of argument	7
Argument	8

I.

<p>The only question presented is whether the District Court and the Circuit Court of Appeals were right in denying sovereign immunity to a commercial vessel owned by but neither in the possession nor in the public service of a friendly foreign power at the time of her seizure under judicial process. The other issues suggested by the petition are not before this court.....</p>	8
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II.

<p>There is no conflict between the circuits on the question raised by this petition. Nor does the petition present any federal question which has not been and should be decided by this court. The sole question presented by the petition has been decided by this court in <i>The Navemar</i>, 303 U. S. 68. Following the general current of American law, it was there held that a government-owned commercial vessel can not claim immunity unless the vessel was in the possession of that government and operated by it in its service and interest</p>	15
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III.

Since the Baja California was neither in the possession nor the public service of the Republic of Mexico, the claim of sovereign immunity was properly denied, regardless of the fact that the Mexican Government had title to the vessel. Petitioners' authorities do not sustain the contention that title alone is sufficient to establish immunity of a foreign government-owned merchant vessel. The modern trend is to restrict, not enlarge, the immunity of commercial vessels.... 19

Conclusion	23
------------------	----

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Attualita, The, 238 Fed. 909.....	9, 17
Beaverton, The, 273 Fed. 539.....	18
Berizzi Bros. Co. v. The Pesaro, 271 U. S. 562, 46 S. Ct. 611, 70 L. Ed. 1088.....	13, 15, 16, 22
Carlo Poma, The, 259 Fed. 369.....	17
Commercial Union of South America v. Anglo-South American Bank, 10 F. (2d) 937.....	10
Cristina, The, [1938] A. C. 485.....	21, 22
Davis, The, 77 U. S. (10 Wall. 15), 19 L. Ed. 875.....	17
Exchange, The, 7 Cranch (11 U. S.) 116, 3 L. Ed. 287.....	20
Galef v. United States, 25 F. (2d) 134.....	9
Johnson Lighterage Co. No. 24, The, 231 Fed. 365.....	18
Katingo Hadjipatera, The, 1941 A. M. C. 581, 40 F. Supp. 546, affd. 119 F. (2d) 1022, cert. den. 313 U. S. 593, 61 S. Ct. 1118, 85 L. Ed. 1547.....	9, 18
Long v. The Tampico, 16 Fed. 491.....	17
Maru Nav. Co. v. Societa Commerciale Italiana Di Navigation, 271 Fed. 97.....	18
Navemar, The, 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667.....	4, 7, 9, 15, 18, 21, 22
Panama Railroad Co. v. Napier Shipping Co., 166 U. S. 280, 17 S. Ct. 572, 41 L. Ed. 1004.....	9
Parlement Belge, The, L. R. 5 P. D. 197.....	21
Roseric, The, 254 Fed. 154.....	18
Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd de Brasileiro, 27 F. (2d) 1002.....	9
Sonzinsky v. United States, 300 U. S. 506, 57 S. Ct. 554, 84 L. Ed. 772.....	8

	PAGE
United States v. Allegheny County, Pennsylvania, 322 U. S. 174, 88 L. Ed. 845, 64 S. Ct. 908.....	20
United States of Mexico v. Rask, 118 Cal. App. 21, 4 P. (2d) 981	18
Uxmal, The, 40 F. Supp. 258.....	13, 18
Virginian R. Co. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789.....	11
Western Maid, The, 257 U. S. 419, 42 S. Ct. 159, 66 L. Ed. 299	20
Wildcroft, The, 201 U. S. 378, 26 S. Ct. 467, 50 L. Ed. 794.....	11
Workman v. New York, 179 U. S. 552, 21 S. Ct. 212, 45 L. Ed. 314	11

STATUTES.

Judicial Code, Sec. 240 (U. S. C., Title 28, Sec. 347).....	2
Public Vessels Act (46 U. S. C. A., Sec. 781).....	22
Suits in Admiralty Act (46 U. S. C. A., Sec. 741).....	22

TEXTBOOKS AND PERIODICALS.

6 Benedict on Admiralty, p. 55.....	21
1 Hyde, International Law, Sec. 257.....	22
Robinson on Admiralty, p. 277.....	22
Robinson on Admiralty, p. 363.....	21
1 St. John's Law Review, 5.....	22
50 Yale Law Journal, 1088.....	22

IN THE
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THE REPUBLIC OF MEXICO and

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of Mexico, as Owner,

Petitioners,

vs.

R. B. HOFFMAN,

Respondent.

**BRIEF OF RESPONDENT R. B. HOFFMAN IN
OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI.**

Opinions Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit has not yet been officially reported, but it has been printed in the advance sheets of the Federal Reporter (143 F. (2d) 854). It appears in the record commencing at page 240.

The opinion of the District Court is printed at 45 F. Supp. 519.

Jurisdictional Statement.

The judgment of the Circuit Court of Appeals was filed and entered June 30, 1944 [R. 252]. Petitioners filed a petition for rehearing, which was denied August 4, 1944 [R. 252].

The jurisdiction of the United States District Court was established by the physical presence of the respondent vessel in the district when process was first issued. The action was for a tort occurring on navigable waters and was clearly within the general admiralty jurisdiction.

The petitioners invoke the jurisdiction of this Court under Section 240 of the Judicial Code (U. S. C. Title 28, Section 347).

Statement of the Case.

The statement of the case in the petition is inadequate.

On October 19, 1941, the Mexican steamship CAMPECHE, in tow of the Mexican steamship BAJA CALIFORNIA, collided with the American gas screw steamer LOTTIE CARSON, then at anchor in the harbor of Mazatlan, Sinaloa, Mexico. As a result of the collision the LOTTIE CARSON was sunk and became a total loss. Respondent R. B. Hoffman, as owner of the LOTTIE CARSON, on his own behalf, on behalf of California Packing Corporation, mortgagee of the vessel, and on behalf of underwriters whose claims arose by subrogation [R. 192], filed on December 15, 1941, a libel in the United States District Court for the Southern District of California [R. 4]. The libel was *in rem* against the vessel and *in personam* against Compania Mexicana de Navegacion del Pacifico S. de R. L., the corporation operating the vessel both at the time of the collision and at the time of the libel. Pur-

suant to monition the BAJA CALIFORNIA was attached by the United States Marshal. Service of process was not effected upon the corporation respondent and the case proceeded against the vessel alone.

On December 24, 1941, the Mexican Consul at Los Angeles filed on behalf of the Ambassador for the Republic of Mexico a so-called "Suggestion" asserting that the BAJA CALIFORNIA was owned by the Republic of Mexico and in its possession [R. 20]. An answer to this document filed by respondent demanded proof of the ownership of the vessel and denied the allegations regarding possession and public service [R. 22].

On January 28, 1942, the United States Attorney for the Southern District of California, acting under the direction of the Attorney General of the United States, "as a matter of comity between the United States Government and the Government of Mexico for such consideration as this Court may deem necessary and proper" filed a Suggestion [R. 32] transmitting a Note of the Mexican Ambassador. The Note stated that the BAJA CALIFORNIA was owned by the Republic of Mexico. Libelant filed a Statement of His Position in response to this Suggestion and, *inter alia*, expressly submitted that the suggestion did not constitute a recognition and allowance by the State Department of the claim of sovereign immunity [R. 39]. An immediate hearing was then had on the issue of sovereign immunity [R. 45]. This hearing was based on a stipulation as to the facts [R. 25] and on documentary evidence, consisting principally of the contract under which the BAJA CALIFORNIA was being operated by the Mexican corporation [R. 48], certain articles of Mexican law dealing with "general lines of communication" [R.

83] and various certificates attesting the authority of the Mexican Ambassador and the registration of the steamer [R. 64-71]. This evidence shows, as we shall point out more particularly later, that the BAJA CALIFORNIA was owned by the Republic of Mexico but was neither in its possession nor its public service at the time of the collision or at the time of filing the libel. The evidence shows that she was in the possession, control and operation of a private corporation in a private freighting venture. The matter was submitted on written briefs [R. 127].

On February 13, 1942, District Judge Paul J. McCormick made an order holding that under the rule of *The Navemar* (303 U. S. 68), no ground had been shown for ousting the jurisdiction of the District Court, respectfully declining the Suggestion of the Republic of Mexico and ordering that the BAJA CALIFORNIA remain in the custody of the United States Marshal until the further order of the Court [R. 129].

The Republic of Mexico on March 30, 1942, filed an answer to the libel [R. 132] and two claims, one in the usual admiralty form [R. 142], the second a special claim asserting sovereign immunity [R. 143].

On April 8, 1942, a second "Suggestion" was filed by the United States Attorney [R. 147] transmitting a Note from the Mexican Ambassador, stating in effect that if the vessel should be released, the Mexican Government would meet any liability that might be declared "directly against it" should "the Courts decide that execution may be had against the vessel" [R. 160]. This Suggestion, like the first, was presented as a matter of comity "for such consideration as the Court may deem necessary and proper." The State Department this time accepted as true the state-

ment that the vessel is the property of the Mexican state, but did not "recognize or allow" anything further. This (the ownership), as Mr. Welles stated, was conceded by libelant at the January hearing [R. 149]. Libelant filed a reply to this Suggestion pointing out that if the vessel were released without a bond the District Court would have no jurisdiction to proceed further, and respectfully declining to accept the Mexican Government's proposal [R. 165]. Libelant renewed his offer to accept a bond without prejudice to the claim of sovereign immunity, but the Republic of Mexico rejected this offer [R. 177].

The case then went to trial on the merits, before District Judge Ben Harrison, May 6, May 13 and May 14, 1942. Witnesses were called and examined by both sides and documentary evidence was introduced. During the trial counsel for the Republic of Mexico stated in answer to an inquiry from the Court, that the Mexican Government had no additional evidence to submit on the issue of sovereign immunity [Stipulation, R. 225]. The Court filed a memorandum opinion [R. 185] holding the BAJA CALIFORNIA solely at fault for the collision and the loss of the LOTTIE CARSON. The Court held that in the absence of any additional evidence or a showing of extraordinary circumstances calling for a review of the question of sovereign immunity, the ruling of Judge McCormick on that subject was the law of the case [R. 189].

Findings of fact and conclusions of law were filed July 31, 1942, and the same day an interlocutory decree and order of reference was made [R. 201]. A reference was duly had to determine the amount of damage.

The District Court made a final decree on December 12, 1942 [R. 203], ordering a recovery in favor of libelant for the damages, interest and costs and directing a

sale of the vessel to satisfy the decree. Before the sale took place, however, the Republic of Mexico filed a petition for and obtained an allowance of an appeal, and obtained the release of the vessel by making a cash deposit in lieu of a supersedeas bond [R. 213].

Assignments of error, general in scope, were first filed; but later the appeal was made a limited appeal by stipulation and praecipe [R. 222] and by appellant's statement of points on which it intended to rely [R. 232]. The sole question presented to the Circuit Court of Appeals was the correctness of the order denying the Mexican Government's plea of sovereign immunity.

The Circuit Court of Appeals for the Ninth Circuit unanimously affirmed the District Court's decree, June 30, 1944 [R. 251]. There is a specially concurring opinion [R. 248] but no disagreement as to the result. All the judges concurred that the BAJA CALIFORNIA was a commercial vessel owned by, but not in the possession or public service of the Mexican government, and that she was not entitled to immunity. A petition for rehearing was filed and denied August 4, 1944 [R. 252].

The Republic of Mexico then filed its petition for certiorari in this Court.

The sole question presented by the limited appeal to the Circuit Court of Appeals was that of sovereign immunity. That is the sole question here, though the petition seeks improperly to drag in some other questions.

We have concurrent findings in both Courts below that the BAJA CALIFORNIA, both at the time of the collision and at the time of her seizure, was in the possession, operation and control, not of the Mexican Government but of a private corporation.

Summary of Argument.

I. The only question presented is whether the District Court and the Circuit Court of Appeals were right in denying sovereign immunity to a commercial vessel owned by but neither in the possession nor in the public service of a friendly foreign power at the time of her seizure under judicial process. The other issues suggested by the petition are not before this Court.

II. There is no conflict between the circuits on the question raised by this petition. Nor does the petition present any Federal question which has not been and should be decided by this Court. The sole question presented by this petition has been decided by this Court in *The Navemar*, 303 U. S. 68. It was there held that a government-owned commercial vessel can not claim immunity unless the vessel was in the possession of that government and operated by it in its service and interest.

III. Since the BAJA CALIFORNIA was neither in the possession nor the public service of the Republic of Mexico, the claim of sovereign immunity was properly denied, regardless of the fact that the Mexican Government had title to the vessel. Petitioner's authorities do not sustain the contention that title alone is sufficient to establish immunity of a foreign government-owned merchant vessel. The modern trend is to restrict, not enlarge, the immunity of commercial vessels.

ARGUMENT.

I.

The Only Question Presented Is Whether the District Court and the Circuit Court of Appeals Were Right in Denying Sovereign Immunity to a Commercial Vessel Owned by but Neither in the Possession Nor in the Public Service of a Friendly Foreign Power at the Time of Her Seizure Under Judicial Process. The Other Issues Suggested by the Petition Are Not Before This Court.

Petitioners enumerate a number of "Issues Presented by This Petition" (page 5) and urge still others in their Brief as grounds for granting a hearing.

Except for the issue of sovereign immunity, none of these are before this Court.

It is suggested that because the tort was committed by the BAJA CALIFORNIA in Mexican waters the United States District Court should have dismissed the action and required libellant to proceed in the Mexican courts. It is true that the right to claim "lack of jurisdiction" on this ground was reserved in the answer [R. 135] and that the point was urged in the second Note of the Mexican Ambassador [R. 161], but the contention was not argued at the trial, no error was assigned with respect thereto, and it was not mentioned on the appeal. The proposition cannot be noticed here. *Sonzinsky v. United States* (1937), 300 U. S. 506, 57 S. Ct. 554, 84 L. Ed. 772. Petitioners were well advised not to press this point. It had no merit. An American citizen may commence a libel in the courts of his own nation, in fact in the district of his own residence, for a tort committed on navigable waters, even though they be the territorial waters

of another state, when the offending vessel is within the district where he files his action. *Panama Railroad Co. v. Napier Shipping Co.* (1897), 166 U. S. 280, 17 S. Ct. 572, 41 L. Ed. 1004; *Galef v. U. S.* (E. D., S. C., 1928), 25 F. (2d) 134; *Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd de Brasileiro* (E. D., N. Y., 1928), 27 F. (2d) 1002.

It is intimated that the District Court should have dismissed the action on the basis of the Suggestion transmitting the note of the Secretary of State. But the claim of immunity was not "recognized and allowed" by the State Department. The Department merely passed the claim along to the Court for its judicial determination.* Petitioners' counsel never claimed otherwise, at the hearing on sovereign immunity, at the trial or on the appeal. When the State Department, *after the Court had denied immunity at the preliminary hearing*, accepted "as true the statement that the vessel is the property of the Mexican State," it merely affirmed a fact that everyone had admitted. It did not "recognize or allow" anything else. It did not direct or even recommend the release of the vessel. It is not claimed that the suggestion made by the Mexican Consul was anything more, at most, than a mere pleading. The question of sovereign immunity was properly treated throughout this case as a judicial, not a political question.

*See *The Attualita* (C. C. N. Y. 4th 1916) 238 Fed. 909; *The Katingo Hadjipatera* (S. D., N. Y. 1941) 1941 A. M. C. 581, 40 F. Supp. 546; *affd.* (C. C. A. 2d, 1941), 119 F. (2d) 1022, cert. den. 313 U. S. 593, 61 S. Ct. 1118, 85 L. Ed. 1547;

Cf. *The Navemar* (1938) 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667.

Although denying that the claimed immunity ever existed, we argued on the appeal that the Republic of Mexico had waived any privilege of asserting sovereign immunity by making an unqualified general appearance and then proceeding to trial on the merits, instead of taking an appeal on the jurisdictional issues alone. The majority of the Circuit Court of Appeals holds there was no waiver, but that the District Court correctly decided that sovereign immunity did not exist. One Circuit Judge thought that the question of waiver should not be passed upon, inasmuch as all three Circuit Judges agreed that there was no right to sovereign immunity in the first place. The question of waiver is therefore not involved, unless this Court should conclude that the District Court and the Circuit Court of Appeals were wrong in denying sovereign immunity on the merits.

The argument on the "law of the case" (Item 7, page 7, of the Petition) does not present anything for review here. The Mexican Republic was not precluded from "again raising the issue" of sovereign immunity during the trial of the case. On the contrary, the trial court expressly invited the Mexican Republic to make any additional showing it had on that question. In the absence of such new evidence, Judge Harrison was right in declining to review the action of another District Judge in the same case, on the sovereign immunity question. *Commercial Union of South America v. Anglo-South American Bank* (C. C. A. 2, 1925), 10 F. (2d) 937. The Circuit Court of Appeals, however, elaborately reviewed the question on the merits and found against immunity.

The only question properly raised by the petition is whether a foreign government-owned merchant vessel is entitled to immunity from judicial process in a libel for a collision solely caused by her negligence, when she was neither in the possession nor the public service of the foreign government at the time of the collision or at the time of the seizure.

At neither time was the BAJA CALIFORNIA in the possession of the Republic of Mexico. The Circuit Court of Appeals agreed with the District Court's finding that "at the time of the collision * * * and at the time of filing the libel and service of the monition herein, she (the BAJA CALIFORNIA) was in the possession, operation and control of respondent Compania Mexicana de Navegacion, S. de R. L." [R. 244].

This Court has repeatedly held that concurrent findings of fact of two courts below will be accepted as conclusive unless plainly erroneous or unsupported by evidence. *Workman v. New York* (1900), 179 U. S. 552, 555, 21 S. Ct. 212, 45 L. Ed. 314; *The Wildcroft* (1906), 201 U. S. 378, 387, 26 S. Ct. 467, 50 L. Ed. 794; *Virginian R. Co. v. System Federation No. 40* (1937), 300 U. S. 515, 542, 57 S. Ct. 592, 81 L. Ed. 789.

The record supports the findings of the Courts below. The vessel had been delivered into the possession of a private corporation under a contract set out (in translation) on pages 48 to 63 of the Record. That contract was not a mere agency agreement. The corporation employed the crew at its own expense, assumed the burden of insuring the vessel, bore all the losses. The entire venture was at the risk and for the account of the corporation. If there were net profits from the business,

one-half thereof were to be paid the Mexican Republic. We refer to the opinion of the Circuit Court of Appeals for an analysis of the agreement [R. 244, 245]. The master's statement [R. 30] shows that the contract provisions were carried out. The private corporation received the ship's gross income, disbursed all the expenses, including the salaries of the officers and the wages of the crew, and completely managed the commercial operation of the vessel. The officers and crew were selected and employed by the corporation. They were not agents of the Republic and they did not hold the vessel in behalf of the Government. There is no escape from the finding of the District Court and of the Circuit Court of Appeals that the corporation and not the Republic of Mexico had possession of the vessel.

Petitioners do not contend otherwise. It is nowhere suggested that actual possession was in the Republic. It is asserted that the Government had "dominion and control" over the vessel. The fact is that the vessel had been delivered to a private corporation for commercial operation under a contract which gave the Republic no more dominion or control over the BAJA CALIFORNIA than it had over any other vessel in the Mexican merchant marine. It is true that in the event of default, the Republic reserved the right to retake possession of the vessel and rescind the agreement, but no such default, recapture or rescission had taken place here.

Petitioners also assert that the vessel was in the "public service of Mexico." This is demonstrably inaccurate. The only sense in which the vessel was in "the public service," and the only sense in which that term is used in the contract between the corporation and the Republic,

is that she was being operated as a common carrier serving the public generally. If such public service were sufficient to confer immunity, no vessel employed as a common carrier would be subject to the process of any court. "Public service" as used in the sovereign immunity cases means service for some national purpose, for the direct benefit of the government or country as a whole, as distinguished from service for the benefit of any individual or group of persons.*

A comparison of the contract under which the BAJA CALIFORNIA was being operated and the translation of the Mexican law of "the general lines of communication" [R. 83-110] shows that the corporation, in its operation of the BAJA CALIFORNIA, is treated in all substantial respects the same as are all other private corporations engaged in the merchant shipping business. Thus the contract provision for one-half the net profits [R. 50] is merely a compliance with Article 110 of the General Law [R. 100] providing for governmental "participation" in the revenue of all private shipping companies. The provisions of Article 8 of the contract that the routes shall be approved by the Government [R. 51] simply follow Article 200 of the General Law applicable to all the Mexican merchant marine [R. 104]. The requirement that naval, army or political officers should be transported free or at reduced rates [R. 52] is an exact paraphrase of the General Law applicable to all merchant ships. See Articles 57, 58, 102, 104 and 118 [R. 95, 96, 99, 100]. The provisions giving port facilities [R. 54, 55] are not basically different from Articles 27 and 183 of

*See *Berizzi Bros. Co. v. The Pesaro* (1926), 271 U. S. 562, 46 S. Ct. 611, 70 L. Ed. 1088; *The Uxmal* (D. Mass. 1941) 40 F. Supp. 258.

the General Law [R. 92, 102]. The "sovereign control" of the Mexican Government over the services provided in the contract is "a mere restatement of the General Law applicable to the termination of all concessions and contracts and the revocation of permits [R. 93]. The alleged power to replace the management relates only to a situation when the corporation might be in default. And even then, in most cases, there must be a hearing before the contract can be terminated [R. 60]. Unless the corporation breached the agreement, the Republic had no authority to dispossess the corporation for five years. [R. 60.]

The master's summary of the ship's operations for a period of two months from the time of the collision to the time of the seizure under process herein, which has been admitted as true for all purposes by the Republic of Mexico [R. 111], is not the story of a ship in governmental service. It is the story of a typical tramp merchant ship engaged in coastal and foreign trade, carrying, with a few inconsequential exceptions, private cargo at the regular rates and private passengers at full fare. [R. 28-30.] The corporation was simply engaged in the transportation of passengers and cargo for hire and the BAJA CALIFORNIA was no more "in the public service" of the Republic of Mexico than is any other vessel in that nation's merchant fleet.

The BAJA CALIFORNIA was not in the possession of the Republic of Mexico. She was not in the public service of the Republic of Mexico. The factual basis of her claim of sovereign immunity is narrowed down to *title* alone. This, under settled law, including the decisions of this Court, is not a sufficient reason for requiring the Court to withhold its normal jurisdiction.

II.

There Is No Conflict Between the Circuits on the Question Raised by This Petition. Nor Does the Petition Present Any Federal Question Which Has Not Been and Should Be Decided by This Court. The Sole Question Presented by the Petition Has Been Decided by This Court in *The Navemar*, 303 U. S. 68. Following the General Current of American Law, It Was There Held That a Government-Owned Commercial Vessel Can Not Claim Immunity Unless the Vessel Was in the Possession of That Government and Operated by It in Its Service and Interest.

The *indispensable* requisites and the *only* requisites for a successful claim of sovereign immunity are that the vessel be in the *possession* of the foreign sovereign and employed in its *public service*. Without them government ownership is of no avail. With them the ownership of the vessel need not be in the government.

Berizzi Bros. Co. v. The Pesaro (1926) 271 U. S. 562, 46 S. Ct. 611, 70 L. Ed. 1088, held that a ship owned and possessed by a foreign government and operated by it in the service and interest of the whole nation, as distinguished from any individual member, was immune from arrest even though it was being operated in the carriage of merchandise for hire.

In *The Navemar* (1938) 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667, this Court held that a vessel owned by, but *not* in the possession or public service of a foreign government was not entitled to immunity. The *NAVEMAR* was libeled by a private company under a claim of

ownership. It was asserted that the crew unlawfully deprived libelant of the possession of the vessel. The Spanish (Loyalist) Government claimed that the vessel was immune from process, in that title had been taken by the Government as the result of a decree of expropriation published in Spain while the NAVEMAR was at Buenos Aires. The District Court held that the Spanish Government could not bring itself within the rule of *Berizzi Bros. Co. v. The Pesaro, supra*, unless it could "show not merely that the vessel was the *property* of the Republic of Spain but also that it was *possessed* by that government and was *operated by it in its service and interest*. Otherwise immunity cannot be successfully urged to protect a ship, engaging in the carriage of merchandise for hire, from seizure by judicial process." (17 F. Supp. at 650.) At a second hearing before the District Court it was held that "constructive possession" flowing from ownership is not the equivalent of physical possession necessary to confer immunity (18 F. Supp. at 157). The District Court was reversed by the Circuit Court of Appeals on the grounds that the allegations of possession and public service contained in the Ambassador's "Suggestion" were conclusive on the Court, and that in any event the Spanish Government had "constructive possession" which was sufficient as a basis for sovereign immunity.

This Court reversed the Circuit Court on both grounds and upheld the District Court. In a unanimous decision it held that the allegations in the Ambassador's Suggestion were not conclusive on the Court. It held that

immunity was properly denied because the Spanish Government did not prove its claim that the NAVEMAR had been in the *possession* of the Spanish Government. Nor did it support its contention that the vessel was in fact employed in public service. That case, then, is authority for the proposition that a vessel owned by, but not in the actual possession and the public service of, a foreign government is not entitled to immunity.

As to the necessity of *actual possession*, this Court followed the majority rule established by the cases which it cited with approval: *The Davis* (1870) 77 U. S. (10 Wall. 15, 19 L. Ed. 875 (salvage lien enforceable against property belonging to, but not in the possession of the government)); *Long v. The Tampico* (S. D., N. Y. 1883) 16 Fed. 491 (libel for salvage properly brought against vessel intended for the Mexican Government as a revenue cutter where the vessel was not yet in the possession or public service of the Mexican Government); *The Attualita* (C. C. A. 4, 1916) 238 Fed. 909 (vessel requisitioned and in the service of Italian Government not entitled to immunity where she was operated by private owners who paid the crew and all other expenses of the ship); *The Carlo Poma* (C. C. A. 2, 1919) 259 Fed. 369, 370 (reaffirming the principle that the immunity of property of a sovereign depends not merely upon the ownership, but also upon actual possession by the sovereign of the property at the time process is served).

THE NAVEMAR case did not announce any novel doctrine. The insistence on proof of actual possession as

a prerequisite to immunity followed the general current of American Law.*

The decisions of the courts since *THE NAVEMAR* have adhered to its rule.**

There is no dissent in any American case from the proposition that title alone without actual possession is insufficient to confer immunity.

*See, in addition to the cases referred to in *The Navemar* itself: *Maru Nav. Co. v. Societa Commerciale Italiana Di Navigation* (D. Md., 1921) 271 Fed. 97; *The Beaverton* (S. D., N. Y. 1919) 273 Fed. 539; *The Johnson Lighterage Co. No. 24* (D. N. J. 1916) 231 Fed. 365; and compare *United States of Mexico v. Rask* (1931) 118 Cal. App. 21, 4 P. (2d) 981 (Sup. Ct. hrg. den. 1931), where the Mexican Government was denied immunity in a claim and delivery action from an asserted lien by the defendant on the ground that the Republic did not have possession of the boat.

The intimation in the District Court case of *The Roseric*, (D. C., N. J. 1918) 254 Fed. 154, that the appropriation by a government of a vessel and its devotion to public service might be sufficient to confer immunity even without exclusive possession cannot now be taken to be a correct expression of the law, if it ever was.

***The Katingo Hadjipatera* (S. D., N. Y., 1941), 1941 A. M. C. 581, 40 F. Supp. 546, affd. (C. C. A. 2d, 1941) 119 F. (2d) 1022, cert. den. 313 U. S. 593, 61 Ct. 1118, 85 L. Ed. 1547, (Greek Government not entitled to claim immunity for a vessel it had requisitioned where physical possession of the vessel had not been taken prior to the filing of the libel); *The Uxmal* (D. Mass., 1941) 40 F. Supp. 258, (vessel owned by Mexican Government not entitled to immunity where she had been delivered to a cooperative association of producers of sisal, even though the Mexican Government contributed to the capital of the association and had reserved the right to repossess the vessel in the case of national emergency; the Court holding that ownership was not sufficient to confer immunity and that the vessel was not in the possession nor the public service of the Republic of Mexico).

III.

Since the Baja California Was Neither in the Possession Nor the Public Service of the Republic of Mexico, the Claim of Sovereign Immunity Was Properly Denied, Regardless of the Fact That the Mexican Government had Title to the Vessel. Petitioners' Authorities Do Not Sustain the Contention That Title Alone Is Sufficient to Establish Immunity of a Foreign Government-owned Merchant Vessel. The Modern Trend Is to Restrict, Not Enlarge, the Immunity of Commercial Vessels.

It is difficult to determine just what is petitioners' exact contention. They first state that the District Court erred in not accepting the Republic's position that title alone confers sovereign immunity on the vessel. This is not and never was the American law. Later in the Brief, the additional assertion is made that the vessel was dedicated to the public service of Mexico. We have seen that there is no factual basis for this claim. Petitioners do not and can not challenge the undisputed fact and the concurrent finding of the two courts below that the Mexican Government did not have *possession* of the vessel. Actual possession is an indispensable requisite for immunity. The very quotation from Benedict on Admiralty at page 21 of petitioners' Brief shows that the refusal of jurisdiction *in rem* is limited to cases where the seizure results in a *dispossession* of the sovereign. As the BAJA CALIFORNIA was neither in the possession nor the public service of Mexico, the decisions of the District Court and Circuit Court of Appeals denying sovereign immunity were correct.

The cases cited by petitioners do not support any contrary view. We see no necessity for making a detailed

analysis of these decisions. Most of them are not in point. They fall mainly into the following categories:

(1) Cases depending upon, or announcing exceptions to, the general rule that the *domestic sovereign* is exempt from suit without its consent.

(2) Cases holding that property in the actual possession and control of the domestic government or of one of the states and employed in governmental service is immune from seizure.

(3) Cases holding that vessels in the actual possession of a foreign government and devoted to public use are immune from seizure.

(4) Cases announcing the principle that our courts will not ordinarily pass on the validity of acts done by another government within its own territory.

United States v. Allegheny County, Pennsylvania (1944) 322 U. S. 174, 88 L. Ed. 845, 64 S. Ct. 908, deals with the constitutional relation between state and federal governments with regard to the taxation of government property. It does not touch our question.

The Western Maid (1922) 257 U. S. 419, 42 S. Ct. 159, 66 L. Ed. 299, is adequately distinguished from our case in the Circuit Court of Appeals' opinion [R. 243]. *The Exchange* (1812) 7 Cranch (11 U. S.) 116, 3 L. Ed. 287, needs no other distinction than the fact that it concerned a warship in the possession of the French Government.

The English cases on sovereign immunity must be read with caution, as the English procedure *in rem* is not, like ours, basically an action against the *res* itself, but rather in substance an action against the owner coupled with

the right of arrest.* As there is always difficulty in a proceeding attempting directly to implead a foreign sovereign, the English cases have tended to be more sweeping in granting immunity than our own. But even in England the trend is away from immunity. *The Cristina* [1938] A. C. 485, 498, seriously shakes the authority of *The Parlement Belge*, L. R. 5 P. D. 197, and the other English cases referred to by petitioners. In *The Cristina*, Lord Macmillan said: "I confess that I should hesitate to lay down that it is part of the law of England that an ordinary trading vessel is immune from civil process in this realm by reason only of the fact that it is owned by a foreign state."

The alleged distinction between our case and *The Navemar* (Petitioners' Brief, p. 14), is untenable. Again we refer to the opinion of the Circuit Court of Appeals [R. 247].

The District Court did not hold, as petitioners suggest, (Brief, page 19) that the Republic had waived its immunity. It and the Circuit Court of Appeals held that the vessel never was immune.

It is not true that "changing governmental structures" require any enlargement of the immunity principle. The modern doctrine shows exactly the opposite tendency. The Brussels Convention of 1926 (see 6 Benedict on Admiralty, page 55) provides that government-owned commercial vessels, even those in the actual possession and operation of the government, may be arrested the same as privately owned vessels. This convention has been ratified by Mexico. While we do not contend it is binding in this case, since it has not yet been ratified by our own

*See Robinson on Admiralty, page 363.

government, it shows that the Mexican Republic has agreed to a principle of non-immunity going far beyond the holding in our case. Our own government has, of course, waived immunity from suit both with respect to its ships employed as merchant vessels (Suits in Admiralty Act, 46 U. S. C. A. §741) and with respect to the operation of "public," *i.e.*, non-commercial vessels (Public Vessels Act, 46 U. S. C. A. §781). The text writers almost all agree that governments operating commercial vessels should not, in principle, be entitled to claim immunity with respect thereto. The injustice of relegating those injured by such vessels to a makeshift diplomatic remedy is widely recognized.*

Petitioners' alarm over the prospect of judicial seizures of lend-lease property is groundless. The decision in this case would not affect such property, at least if in the possession of agents of any Government and employed for public purposes. None of it, so far as we are aware, is in the possession of private individuals for purely commercial purposes.

The cure for the possible evil suggested by petitioners on page 20 of their Brief in connection with wide-spread state operation of commercial vessels would, we submit, be a statute limiting or repealing the doctrine of *Berizzi Bros. Co. v. The Pesaro*, and not extending the *Pesaro* decision beyond its present scope. The latter alternative would mean overruling *The Navemar*. In other words, make all commercially operated vessels subject to seizure, instead of granting immunity to them all, and, do it, if

*See, for example, Robinson on Admiralty, p. 277; 50 Yale Law Journal, 1088; 1 Hyde, International Law, §257; 1 St. John's Law Review, 5; and see the remarks of Lord Maugham in *The Cristina* [1938] A. C. 485, 521.

that is what is wanted, by Congressional enactment or treaty.

That the Republic of Mexico is a friendly foreign power is conceded. But there is nothing prejudicial to amicable international relations in enforcing the law applicable in a litigation fairly conducted, in which the Republic was given every opportunity to present its defenses. The very fact that no appeal was taken from the District Court's decision on the merits shows that the Mexican Government was satisfied that the case was correctly decided. A good neighbor should not object to paying his lawful debts.

Conclusion.

The petition does not raise any question on which there is a conflict between the circuits.

It does not raise any Federal question which has not been, but should be, decided by this Court. *The Nave-mar* case has disposed of the only question here presented.

There is no reason for reviewing the decision of the Circuit Court of Appeals in this case. The Republic has had its day in court, contested the case throughout, and should not now complain if the court's judgment is enforced.

It is respectfully submitted that the petition should be denied.

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Proctor for Respondent R. B. Hoffman,

HAROLD A. BLACK,

Of Counsel.

FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 455

THE REPUBLIC OF MEXICO and the STEAMSHIP "BATA
CALIFORNIA," BY THE REPUBLIC OF MEXICO, as
Owner,

Petitioners,

vs.

R. B. HOFFMAN,

Respondent.

RESPONDENT'S BRIEF.

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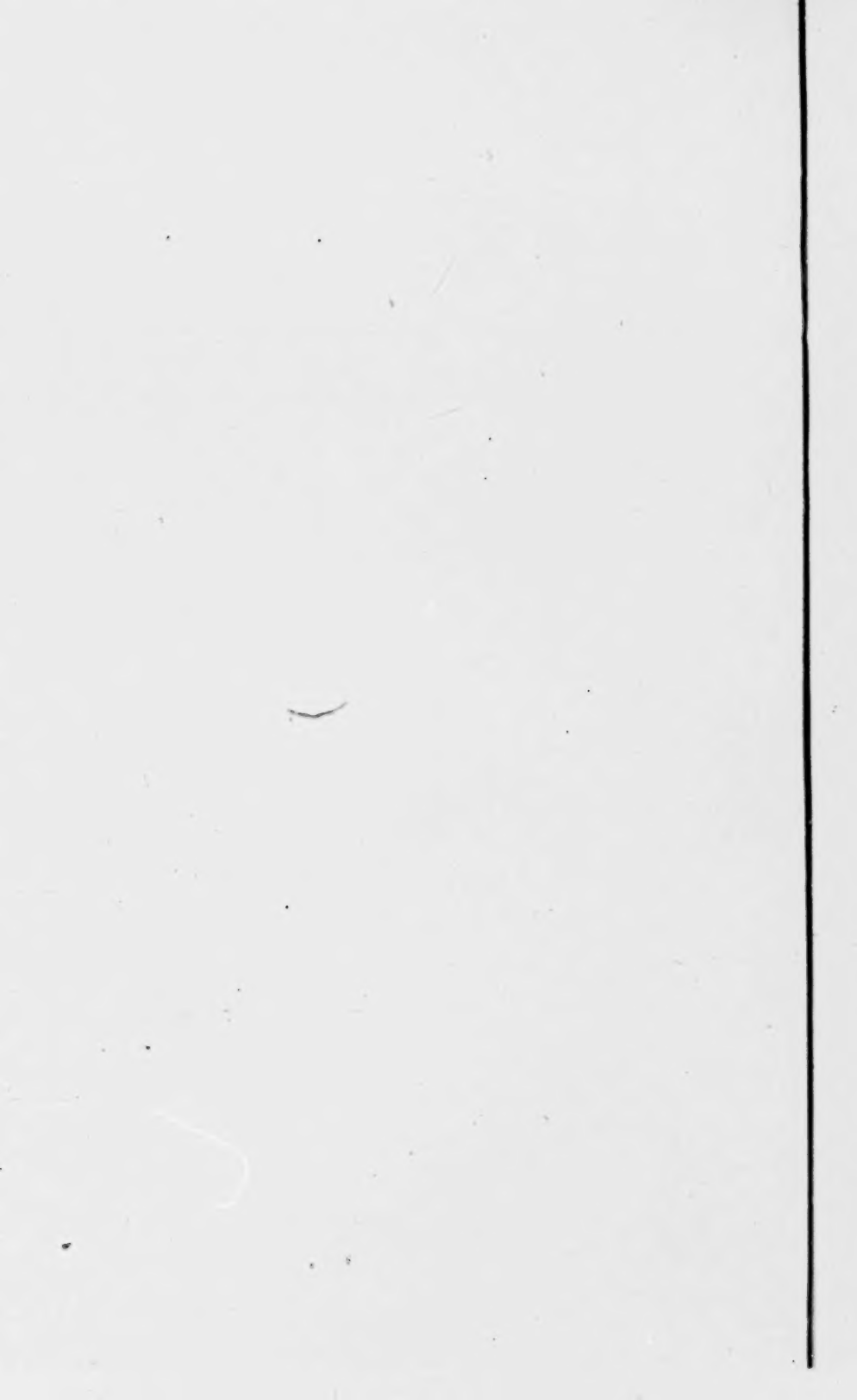
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SUBJECT INDEX.

	PAGE
Reference to official reports.....	1
Jurisdictional statement.....	1
Statement of the case.....	2
Summary of argument.....	5
Argument	6

I.

The only issue before this court is whether a commercial vessel owned by but neither in the possession nor the public service of a friendly foreign power is immune from judicial process	6
---	---

II.

The claim of sovereign immunity was not "recognized and allowed" by our State Department. That issue was left for judicial determination. On that issue there is no dispute as to the facts. They were stipulated to at the hearing before the District Court.....	8
--	---

III.

The Baja California was not in the possession of the Republic of Mexico at the time of the collision or at the time of her seizure under the process of the District Court. She was, on the contrary, in the possession, operation and control of a private corporation	19
---	----

IV.

The Baja California was not in the public service of the Republic of Mexico at the time of the collision or at the time of her seizure under the process of the District Court. She was being operated by a private corporation as an ordinary commercial vessel.....	23
---	----

• V.

Since the Baja California was neither in the possession nor the public service of the Republic of Mexico, the claim of sovereign immunity was properly denied, regardless of the fact that the Mexican Government had title to the vessel. The authorities cited by petitioners do not sustain the contention that title alone is sufficient to establish immunity for a foreign government owned merchant vessel in the process of our courts. The modern trend is to restrict, not enlarge, the immunity of state owned commercial vessels..... 29

Conclusion 47

iii.

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Annette, The; Dora, The [1919] P. 105.....	39, 41
Arantzazu Mendi, The [1939] A. C. 256.....	41
Attualita, The, 238 Fed. 909.....	9, 32
Barnstable, The, 181 U. S. 464.....	36
Belknap v. Schild, 161 U. S. 10.....	36
Berizzi Bros. Co. v. The Pesaro, 271 U. S. 562.....	
.....23, 24, 25, 29, 33, 38, 45, 46, 47	
Beaverton, The, 273 Fed. 539.....	32
Bradford v. Chase National Bank of the City of New York, 24 F. Supp. 28.....	34
Briggs v. Light Boats, 11 Allen (93 Mass.) 157.....	36
Carlo Poma, The, 259 Fed. 369.....	33
China, The, 7 Wall. (74 U. S.) 53.....	36
Cooke v. United States, 91 U. S. 389.....	47
Cristina, The [1938] A. C. 485.....	40, 41, 45
Cunard Steamship Co. v. Mellon, 262 U. S. 100.....	36
Davis, The, 77 U. S. (10 Wall.) 15.....	22, 31
Dexter & Carpenter v. Kunghig Jarnvagsstyrelsen, 43 F. (2d) 705.....	38
Ervin v. Quintinalla, 99 F. (2d) 935.....	34
Exchange, The, 7 Cranch. (11 U. S.) 116.....	25, 37
Fidelity, The, Fed. Case No. 4758 (8 Fed. Case, p. 1191).....	31
Florence H, The, 248 Fed. 1012.....	32
Galef v. U. S., 25 F. (2d) 134.....	7
Hannes v. Kingdom of Rumania Monopolies Institute, 20 N. Y. S. (2d) 825.....	10, 13
Janko, The, 54 F. Supp. 241.....	34
Johnson Lighterage Co. No. 24, The, 231 Fed. 363.....	32

Katingo Hadjipatera, The, 1941 A. M. C. 581, 40 F. Supp. 546, affd. 119 F. (2d) 1022, cert. den. 313 U. S. 593.....	10, 33
Kawanankoa v. Polyblank, 205 U. S. 349.....	36
Keokuk & Hamilton Bridge Co. v. United States, 260 U. S. 125	36
Lamont v. Travelers Ins. Co., 281 N. Y. 362, 24 N. E. (2d) 81	10, 13
Lông v. The Tampico, 16 Fed. 491.....	32
Maipo, The, 252 Fed. 627.....	34
Maliakos, The, 41 F. Supp. 697.....	11
Maru Navigation Co. v. Societa Commerciale Italiana di Navi- gation, 271 Fed. 97.....	32
Miller v. Ferrocarril del Pacifico de Nicaragua, 18 Atl. (2d) 688	12
New York, In re State of, 256 U. S. 503.....	36
Oetjen v. Central Leather Co., 246 U. S. 297.....	37
Panama Railroad Co. v. Napier Shipping Co., 166 U. S. 280.....	7
Parlement Belge, The, L. R. 5, P. D. 197.....	39
Porto Alexandre, The [1920] P. 30.....	39, 40
Roseric, The, 254 Fed. 154.....	34
Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd de Brasileiro, 27 F. (2d) 1002.....	7
Sharrenberg v. Dollar S. S. Co., 245 U. S. 122.....	37
Siren, The, 7 Wall. (74 U. S.) 152.....	36
Sonzinski v. United States, 300 U. S. 506.....	7
State of New York, In re, 256 U. S. 503.....	31
Sullivan v. State of Sao Paulo, 36 F. Supp. 503, 122 F. (2d) 355	15, 17
The Bank of the United States v. The Planters Bank of Georgia, 22 U. S. (9 Wheat.) 904.....	46
Ucayali, The, 318 U. S. 578.....	11

	PAGE
Ulen & Co. v. Bank Gospodarstwa Krajowego, 24 N. Y. S.	
(2d) 201	10
United States v. Allegheny Co. Pennsylvania, 322 U. S. 174....	37
United States v. Belmont, 85 F. (2d) 543.....	37
United States v. Clarke, 33 U. S. (8 Pet.) 436.....	36
United States v. Rodgers, 150 U. S. 249.....	36
United States v. Wilder, Fed. Case No. 16694.....	32
United States of Mexico v. Rask, 118 Cal. App. 21, 4 Pac.	
(2d) 981 (Sup. Ct. hrg. den. 1931).....	33
United States of Mexico v. Schmuck, 56 N. E. (2d) (N. Y.)	
577	17
Uxmal, The, 40 F. Supp. 258.....	33
Virginian R. Co. v. System Federation No. 40, 300 U. S. 515....	19
Western Maid, The, 257 U. S. 419.....	37
Wildcroft, The, 201 U. S. 378	19
Workman v. New York, 179 U. S. 552.....	19

STATUTES.

General Law, Arts. 27, 183.....	27
General Law, Arts. 57, 58, 102, 104, 118.....	27
General Law, Art. 200.....	27
Judicial Code, Sec. 240 (28 U. S. C., Sec. 347).....	1
Public Vessels Act, 46 U. S. C. A., Sec. 781.....	42
Suits in Admiralty Act, 46 U. S. C. A., Sec. 741.....	42

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Yale Law Journal 150, 152	35
6 Benedict on Admiralty, p. 55.....	42
16 Boston University Law Review, 115.....	46
Brinton, Jasper Y., Suits Against Foreign States, 25 Am. Jour.	
Int. Law, 50, 61	44
Cheshire, Private International Law (2d Ed.), p. 96.....	44
39 Columbia Law Review 510.....	41

	PAGE
Fenwick on International Law, 2d Rev. Ed., pp. 218, 228.....	37, 44
6 George Washington Law Review 542.....	34
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40 Harvard Law Review, 126.....	46
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2 Modern Law Review 57.....	41
16 New York University Law Quarterly Review, 490.....	41
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Raymond, Jesse Andrews, Sovereign Immunity in Admiralty, 9 Texas Law Review, 519.....	46
Robinson on Admiralty, p. 277.....	46
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1 Wheaton, International Law (6th English Edition), 240.....	44
36 Yale Law Journal, 145.....	46
50 Yale Law Journal, 1088.....	46

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 455

THE REPUBLIC OF MEXICO and THE STEAMSHIP "BAJA
CALIFORNIA," BY THE REPUBLIC OF MEXICO, as
Owner,

Petitioners,

vs.

R. B. HOFFMAN,

Respondent.

RESPONDENT'S BRIEF.

Reference to Official Reports.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 143 F. (2d) 854. It appears in the record commencing at page 240.

The opinion of the District Court is printed at 45 F. Supp. 519.

Jurisdictional Statement.

The judgment of the Circuit Court of Appeals was filed and entered June 30, 1944 [R. 252]. Petitioners filed a petition for rehearing which was denied August 4, 1944 [R. 252]. They then sought a writ of certiorari in this Court under Section 240 of the Judicial Code (U. S. C.,

Title 28, Section 347) and their petition was granted November 6, 1944.

The jurisdiction of the United States District Court was established by the physical presence of the BAJA CALIFORNIA in the district when process was first issued. The action was for a tort occurring on navigable waters and was within the general admiralty jurisdiction.

Statement of the Case.

This litigation arises out of a collision on October 19, 1941, between the Mexican steamship CAMPECHE, in tow of the Mexican steamship BAJA CALIFORNIA, and the American gas screw schooner LOTTIE CARSON, then at anchor in the harbor of Mazatlan, Sinaloa, Mexico. As a result of the collision the LOTTIE CARSON was sunk and became a total loss. Respondent R. B. Hoffman, as owner of the LOTTIE CARSON, on his own behalf, on behalf of California Packing Corporation, mortgagee of the vessel, and on behalf of underwriters whose claims arose by subrogation [R. 192], filed on December 15, 1941, a libel in the United States District Court for the Southern District of California [R. 4]. The libel was *in rem* against the BAJA CALIFORNIA and *in personam* against Compania Mexicana de Navegacion del Pacifico S. de R. L., the corporation operating the ship both at the time of the collision and at the time of the libel. Pursuant to monition, the vessel was attached by the United States Marshal. Service of process was not effected upon the corporation respondent, and the case proceeded against the vessel alone.

The Republic of Mexico appeared specially, asserting that the vessel was immune from the process of the Court because she was owned by the Mexican Government. At a preliminary hearing on the jurisdictional issues, the evidence showed that the ship, although owned by the Republic of Mexico, was at all material times in the possession and operation of the private corporation. Immunity was therefore denied. The case was tried on the merits and the BAJA CALIFORNIA was held solely at fault. The Mexican Government appealed at first on all grounds, but later limited the appeal to the sovereign immunity point. The Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. Petitioners sought and obtained a writ of certiorari in this Court.

The further history of the case is given in detail in Respondent's Brief in opposition to the petition for a writ of certiorari and need not be repeated here, particularly as petitioners have largely adopted that statement in their Opening Brief. Certain inaccuracies and omissions, however, have crept into the statement given by petitioners. The discussion of the contract whereby the Republic of Mexico turned over the BAJA CALIFORNIA for operation by the private corporation is incomplete. We shall analyze this contract more fully in a later section of this brief. The contract put the BAJA CALIFORNIA in the possession, control and operation of a private corporation in a private freighting venture.

Petitioners' two-fold reference to the second Suggestion of the Attorney General of April 8, 1942 (Brief pp. 3

and 6) is confusing. This Suggestion was not filed until after Judge McCormick's decree had denied petitioners' claim of sovereign immunity. The Suggestion accepted as true the Ambassador's statement that the vessel is the property of the Mexican state but it did not "recognize or allow" anything further. It took no exception to the ruling already made by the Court denying sovereign immunity.

Petitioners' statement of the case does not clearly show that the Republic of Mexico expressly limited its appeal from the District Court's decision to the issue of sovereign immunity after first filing assignments of error covering the merits as well as the immunity point [R. 216]. Nor does petitioners' statement disclose the fact that all three Judges of the Circuit Court of Appeals for the Ninth Circuit agreed that the BAJA CALIFORNIA was a commercial vessel owned by but not in the possession or public service of the Mexican Government and that she was not entitled to immunity.

Summary of Argument.

I. The only issue before this Court is whether a commercial vessel owned by but neither in the possession nor the public service of a friendly foreign power is immune from judicial process.

II. The claim of sovereign immunity was not "recognized and allowed" by our State Department. That issue was left for judicial determination. On that issue there is no dispute as to the facts. They were stipulated to at the hearing before the District Court.

III. The *BAJA CALIFORNIA* was not in the possession of the Republic of Mexico at the time of the collision or at the time of her seizure under the process of the District Court. She was, on the contrary, in the possession, operation and control of a private corporation.

IV. The *BAJA CALIFORNIA* was not in the public service of the Republic of Mexico at the time of the collision or at the time of her seizure under the process of the District Court. She was being operated by a private corporation as an ordinary commercial vessel.

V. Since the *BAJA CALIFORNIA* was neither in the possession nor the public service of the Republic of Mexico, the claim of sovereign immunity was properly denied, regardless of the fact that the Mexican Government had title to the vessel. The authorities cited by petitioners do not sustain the contention that title alone is sufficient to establish immunity for a foreign government-owned merchant vessel from the process of our courts. The modern trend is to restrict, not enlarge, the immunity of state-owned commercial vessels.

ARGUMENT.

I.

**The Only Issue Before This Court Is Whether a
Commercial Vessel Owned by but Neither in the
Possession nor the Public Service of a Friendly
Foreign Power Is Immune From Judicial Process.**

Petitioners enumerate seven issues presented by this "appeal." Three of the so-called issues simply state, in different ways, the same question, which is whether the plea of sovereign immunity was properly denied. As we shall see later, petitioners' contention necessarily resolves itself down to the invalid proposition that a commercial vessel is entitled to immunity merely because she is owned by a friendly foreign power. Two of the other so-called issues are based on the contention (plainly unsound) that because the State Department accepted as true the statement that the vessel was owned by the Mexican Government (and nothing else), the Court was bound to assume that the claim of immunity was "recognized and allowed" and renounce its jurisdiction.

Another so-called issue repeats the suggestion made in the petition and brief that because the tort was committed by the BAJA CALIFORNIA in Mexican waters the United States District Court should have dismissed the suit. It is true that the right to claim "lack of jurisdiction" on this ground was reserved in the answer [R. 135] and that the point was urged in the second Note of the Mexican Ambassador [R. 161] but the contention was not argued

at the trial, no error was assigned with respect to it, and it was not mentioned on the appeal. The proposition can not be noticed here. *Sonzinski v. United States* (1937), 300 U. S. 506. Petitioners were well advised not to press this point. It had no merit. An American citizen may commence a libel in the court of his own nation (in this case in the District Court of his own residence) for a tort committed on navigable waters, even though they be the territorial waters of another state, when the offending vessel is within the district where he files his action. *Panama Railroad Co. v. Napier Shipping Co.* (1897), 166 U. S. 280. In that case this Court said:

"... the law is entirely well settled, both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court."

And see also *Galef v. U. S.* (E. D., S. C., 1928), 25 F. (2d) 134; *Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd de Brasileiro* (E. D., N. Y., 1928), 27 F. (2d) 1002.

The last "issue" is whether the Republic of Mexico waived the plea of sovereign immunity by proceeding to trial on the merits instead of taking an appeal on the jurisdictional issues alone. We made this point in the Circuit Court of Appeals. The majority of that Court held that there was no waiver but that the District Court correctly decided that sovereign immunity did not exist. We are content to stand on the position taken by all three Circuit Judges that there was no right to sovereign immunity in the first place.

II.

The Claim of Sovereign Immunity Was Not "Recognized and Allowed" by Our State Department. That Issue Was Left for Judicial Determination. On That Issue There Is No Dispute as to the Facts. They Were Stipulated to at the Hearing Before the District Court.

In *The Navemar* (1938), 303 U. S. 68, this Court pointed out that in the case of the attachment of a public vessel owned by a friendly government and in its possession, it is open to such government to claim her immunity from suit either through diplomatic channels, or if it chooses, as a claimant in the courts of the United States. Mr. Justice Stone then said:

"If the claim is recognized and allowed by the Executive Branch of the Government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."

The State Department may decline to act at all on the representation of the Ambassador, in which case the foreign government has no recourse but to appear in the action, which it may do specially, and litigate the jurisdictional issues. As has been just shown, the State Department, on the other hand, may treat the immunity of the vessel as primarily a political question and recognize and allow the claim of immunity, in which case it is the duty of the Court to release the vessel.

The State Department, however, may, and often does, take a middle course. It may transmit the representations of the Ambassador to the Court as a matter of comity without "recognizing and allowing" the claim, in which

event the matter is still left for the judicial determination of the Court.

That is exactly what was done in our case. The Suggestion filed by the United States Attorney on January 28, 1942 [R. 32], concludes with the following paragraph:

"In bringing this matter to the attention of the Court, the United States does not intervene as an interested party, nor do I appear either on behalf of the United States or for the Government of Mexico, and I present the suggestion as a matter of comity between the United States Government and the Government of Mexico *for such consideration as this Court may deem necessary and proper*."

Obviously the Note of the Mexican Ambassador was simply presented to the Court for its consideration, and the Executive Branch carefully refrained from taking a position on the merits of the immunity issue. A number of cases have occurred in which the diplomatic representations, as here, were merely transmitted for consideration and where the courts proceeded to determine the question of immunity on its merits.

In *The Attualita* (C. C. A. 4th, 1916), 238 Fed. 909, the suggestion was almost in the same form as that in our case "as a matter of comity between the United States Government and the Italian Government, for such consideration as the court may deem necessary and proper." The Circuit Court of Appeals construed this suggestion as an indication that the State Department intended that

*Italics ours throughout this brief.

the question of sovereign immunity should be judicially determined. On this point the Court said (page 911):

"The steamship says that in any event her right to immunity is a political question, which has been passed upon by the executive branch of the government. A comparison of the suggestion which was filed in *The Exchange*, 7 Cranch. 116, 3 E. Ed. 287, with that in this case, shows quite clearly that, while in *The Exchange* the executive demanded the ship's release, it has in this case carefully refrained from doing anything of the kind."

In *The Katingo Hadjipatera* (S. D., N. Y., 1941), 1941 A. M. C. 581, 40 F. Supp. 546, the suggestion concluded in the identical language used by the United States Attorney in our case. The Court, being uncertain as to the precise effect of this suggestion, caused a telegraphic inquiry to be made to the Department of State which was answered by the acting Secretary of State, Sumner Welles, whose letter is quoted in the report in 1941 A. M. C., page 583, though not in the report in Federal Supplement. This letter stated that the Department of State "feels that the question of the status of the *Katingo Hadjipatera* is one for judicial determination." The Court thereupon heard the evidence presented by both sides and denied the claim of immunity interposed by the Greek Government. The case was affirmed in the Circuit Court of Appeals on the opinion below (C. C. A. 2d) 119 F. (2d) 1022, and certiorari was denied by this Court (313 U. S. 593).

See also *Lamont v. Travelers Ins. Co.* (1939), 281 N. Y. 362, 24 N. E. (2d) 81; *Hannes v. Kingdom of Rumania Monopolies Institute* (1940), 20 N. Y. S. (2d) 825; *Ulen & Co. v. Bank Gospodarstwa Krajowego* (1940), 24 N. Y. S. (2d) 201.

In contrast to these cases there are a number of decisions where the State Department recognized and allowed the claim of immunity or where it "accepted as true" recitals of fact which necessarily had the effect of recognizing the immunity. These cases show that where the State Department does recognize and allow the claim its Note and the Suggestion are aptly and explicitly worded to that purpose. Thus in *The Ucayali* (1943), 318 U. S. 578, the Suggestion of the United States Attorney prayed "that the claim of immunity made on behalf of the said Peruvian steamship *Ucayali* and recognized and allowed by the State Department be given full force and effect by this court" and "that the said vessel proceeded against herein be declared immune from the jurisdiction and process of this court."

In *The Maliakos* (S. D., N. Y., 1941), 41 F. Supp. 697, cited by petitioners, the note of the Secretary of State, presented with the Suggestion, said that the State Department "accepts as true the statements of fact contained in the Greek Minister's notes." The Greek Minister had recited that at the time of the arrest of the vessel it was in the possession of the Royal Greek Government, was being operated in its service and interest, and was so employed in the service and interest of the whole Greek nation, as distinguished from any individual thereof, and that the Greek Government in the successful prosecution of the war was in urgent need of the vessel and that great damage would ensue should the attachment be continued and the vessel detained. The Court communicated directly

with the State Department in order to confirm its construction of the note and Secretary of State Cordell Hull replied in part as follows:

"In my letters of August 25, 1941 to the Honorable Francis Biddle, Acting Attorney General, I stated that the statements of fact contained in the notes of the Greek Minister at Washington were accepted as true. By this statement I intended to convey the understanding that I recognized as warranted the claim of immunity made by the Greek Minister with reference to these steamships."

Under the circumstances the Court very properly dismissed the libel *in rem*.

In *Miller v. Ferrocarril Del Pacifico de Nicaragua* (1941), 18 Atl. (2d) 688, a decision of the Supreme Judicial Court of Maine, also cited by petitioners, an action was brought directly against the defendant governmental corporation to recover compensation for legal services rendered in connection with a claim for refund of certain taxes. In this case the Suggestion did not expressly "accept as true" the diplomatic representations, but these representations set out that our own government had already recognized the defendant corporation as an instrumentality of the Nicaraguan Government, and had entered into a treaty with Nicaragua in connection with this very claim for the tax refund. The Secretary of State requested the Attorney General to "instruct the appropriate United States Attorney to appear before the Court at this hearing and to represent to the Court the position of the Nicaraguan Government as above set forth." The Maine Supreme Court concluded that this was tantamount to recognition and allowance of the claim of the Nicaraguan

Government. It pointed out that the statement relative to the recognition by this Government and to the treaty was peculiarly within the knowledge of the Executive Department of our Government. If it had been untrue, the Maine Court said, the Secretary of State would not have permitted such an assertion of fact to be made without denial or explanation. The Court distinguishes this situation from the *Lamont* and *Hannes* cases, *supra*, as follows:

"But the plaintiffs, relying on the case of *Lamont et al. v. Travelers Insurance Company et al.*, 281 N. Y. 362, 24 N. E. 2d 81, further contend that the action should not have been dismissed because neither the Attorney General of the United States nor the Assistant United States Attorney for the District of Maine suggested a dismissal. It is not necessary that a suggestion of dismissal should have been made by either of them.

"The instant case is unlike the *Lamont* case. In that case, and in *Hannes v. Kingdom of Roumania Monopolies Institute*, 1940, 260 App. Div. 189, 20 N. Y. S. 2d 825, although acting at the suggestion of the Secretary of State, the Attorney for the United States was very careful to present to the court what amounted to nothing more than a mere plea of immunity made by the foreign government, thus raising only an issue of fact to be decided by the court; for, in each of those cases, it was explicitly stated that the matter was presented for 'such consideration as the Court may deem necessary and proper.' (281 N. Y. 362, 24 N. E. 2d 86.) It is no wonder that the court concluded from that presentation, so carefully and qualifiedly made, that the executive branch of our government had not indicated that it had taken any position as to the foreign government's claim of

sovereignty, but had left the issue to be determined by the court on the facts and the law.

"In the case at bar, however, no question is raised by the Attorney for the United States for judicial determination. On the contrary, in effect, by way of suggestion, he called the attention of the court to the fact that the executive branch of our government, which is supreme in its own sphere, had already acted in the matter, and that the claim made by the Republic of Nicaragua 'through the diplomatic channels of the Department of State of the United States' to the effect that the defendant corporation was and is, in fact, an instrumentality of the government of Nicaragua, had already been recognized by the government of the United States in connection with said claim for refund of taxes, and in the treaty itself."

The case, therefore, holds that where the State Department transmits a diplomatic representation as to certain transactions of our own Government and takes no exception thereto, it impliedly "accepts as true" *the facts* recited. The Court took the view that those facts were sufficient as a matter of law to entitle the defendant to immunity. In our case, however, the only representation of fact made at any time by the Mexican Ambassador is that the BAJA CALIFORNIA was owned by the Republic of Mexico. This fact was established by the evidence and conceded by all parties. All that the State Department accepted as true was the ownership of the vessel. This is *not* sufficient, as a matter of law, to confer sovereign

The case of *Sullivan v. State of Sao Paulo* (E. D., N. Y., 1941), 36 F. Supp. 503 (C. C. A. 2d), 122 F. (2d) 355, is clearly distinguishable from ours. There an action was commenced against the State of Sao Paulo to recover principal and interest on certain bonds. After the suit was filed the Brazilian Ambassador sent a letter to the State Department asserting the alleged immunity of the State of Sao Paulo. The State Department requested the United States Attorney to submit a written suggestion. Certain correspondence ensued to obtain clarification as to the extent to which the State Department had recognized and allowed the claim of the United States of Brazil and its federated state. These letters are printed in the margin of the report of the decision of the District Court (36 F. Supp. 504 and 505). The first letter indicates that the State Department had no doubt as to the accuracy of the statements contained in the Ambassador's note concerning the status of the Brazilian states or the statements concerning the ownership and disposition of the funds. The letter concluded that it was the practice to leave the question of immunity to the courts, applying the principles of international law to the facts and circumstances of the particular cases. A second letter from the State Department went further and stated that the Department's action implied an acceptance as true of the statements of fact made by the Brazilian Government, but that it was felt that the ultimate decision of the question of immunity should be left to the Court. The letter said finally that it was the view of the State Department that the interest

of the Government of Brazil in the funds is of such character as to entitle them to immunity from attachment by private litigants. The lower court accordingly took the view that the *facts* were established by the Suggestion. But the Court did not *ipso facto* dismiss the suit. It then went on to decide, as a matter of law, whether these facts justified the granting of sovereign immunity. The case went up on appeal to the Circuit Court of Appeals (122 F. (2d) 355). That Court thought "some favorable implication must be drawn" from the fact that the State Department acted at all, and that the transmittal of the claim constituted an implied recognition of the recitals of fact. The decision points out that when pressed, the State Department went much further and not only vouched for the accuracy of the statements of fact but expressed the view that they were of such character as to entitle the funds to immunity. The majority of the Court, however, held that the adjudication of present rights to property within a court's jurisdiction is a purely judicial function. The question of immunity was considered on its merits, and the Court concluded that the immunity should be granted. Judge Learned Hand wrote a specially concurring opinion in which he was disposed to place the affirmance of the lower court's decision on the ground that the action of our State Department, as clarified by its correspondence, indicated that the Department thought the issue important enough for the District Court not to proceed and that therefore the Court should decline to exercise jurisdiction.

It will be seen that in the *Sullivan* case, the State Department not only accepted as true the facts which justified a claim of immunity but expressed the opinion that the claim was well founded. In our case, the State Department did *not* recognize or allow the claim of immunity. It left that wholly to the Court.

A recent decision of the New York Court of Appeals, *United States of Mexico v. Schmuck* (1944), 56 N. E. (2d) (N. Y.) 577, 580, summarizes the effect of the two forms of suggestion as follows:

"A mere suggestion of immunity or assertion by a sovereign that a defendant sued here is its agent or that property seized under process of a court belongs to the sovereign does not, however, compel the court to decline jurisdiction or preclude judicial inquiry into the facts—even though the suggestion be presented to the court by the Attorney General upon the request of the Department of State. A suggestion so presented is only the allegation of a claim and 'gives to the foreign government only the right to intervene and prove its allegation' unless the Department of State does more than present the suggestion for 'such consideration as the Court may deem necessary and proper.' *Lamont v. Travelers Ins. Co.*, 281 N. Y. 362, 372, 374, 24 N. E. 2d 81, 85, 86. The situation is different when the claim has been examined by the 'political arm of the Government charged with the conduct of our foreign affairs' and has been *recognized and allowed* by it. *Ex parte Peru, supra*, 318 U. S. page 588, 63 S. Ct. page 800, 87 L. Ed.

1014. The court there said that 'upon recognition and allowance of the claim by the State Department and certification of its action presented to the court' by the Attorney-General, it is the duty of the court to decline jurisdiction, surrender the property held by virtue of its process and remit a plaintiff to the relief obtainable through diplomatic channels."

In our case the State Department "accepted as true" the fact, which nobody denied, that the BAJA CALIFORNIA was owned by the Republic of Mexico but did not accept as true that she was in the possession or service of Mexico, or recognize or allow the claim of immunity. On the contrary, that issue was expressly left for the Court's judicial determination. The State Department did not direct, or even recommend, the release of the vessel.

There was no dispute as to the facts. Most of them are covered by a stipulation [R. 25] and at the hearing the statement of facts contained in the stipulation was expressly confirmed [R. 112, 113]. Documentary evidence was admitted without objection on either side, the authenticity of which was not challenged. This evidence will be more fully examined in the next two sections. It shows:

1. That the BAJA CALIFORNIA was not in the possession of the Republic of Mexico either at the time of the collision or at the time of its seizure under judicial process.

2. That the BAJA CALIFORNIA was not in the public service of the Republic of Mexico at either of said times.

III.

The Baja California Was Not in the Possession of the Republic of Mexico at the Time of the Collision or at the Time of Her Seizure Under the Process of the District Court. She Was, on the Contrary, in the Possession, Operation and Control of a Private Corporation.

The District Court expressly found on the record that [R. 192]:

"At the time of the collision hereinafter referred to and at the time of filing the libel and the service of the monition herein, she (the BAJA CALIFORNIA) was in the possession, operation and control of respondent Compania Mexicana de Navegacion del Pacifico S. de R. L."

The Circuit Court of Appeals agreed with this finding [R. 244].

Concurrent findings of fact of two courts below will be accepted by this Court as conclusive unless plainly erroneous or unsupported by evidence. *Workman v. New York* (1900), 179 U. S. 552, 555; *The Wildcroft* (1906), 201 U. S. 378, 387; *Virginian R. Co. v. System Federation No. 40* (1937), 300 U. S. 515, 542.

The record supports the findings of the courts below. It was stipulated in writing and admitted in open court by proctors for the Republic of Mexico that the steamship BAJA CALIFORNIA was "delivered by the Mexican Government on August 27, 1941, to the Cia Mexicana de Navegacion del Pacific," the corporation made a respondent *in personam* in the libel, and that the said BAJA CALIFORNIA was on and after October 3, 1941, "and at the time of seizure under process herein, being operated by the said

Cia Mexicana de Navegacion del Pacifico under the terms and conditions of the contract designated said Republic's Exhibit 'A' " [R. 27].

The above mentioned contract itself recites the fact that the BAJA CALIFORNIA was *delivered* by the Mexican Government to Mr. Abaunza, who is the general manager of the respondent corporation, on the 27th of August, 1941 [R. 49].

Full provision for the formalities and details of transfer or delivery of the ship to the corporation is contained in the Sixth Article of the contract [R. 51]. The contract provided that the corporation was to "commercially operate and handle" the vessel for a period of five years with an option to renew the contract for an additional five years [R. 49, 60]. The respondent is a privately-owned and operated corporation, with a paid in capital of one hundred thousand pesos [R. 49].

The Mexican Government, doubtless because it was aware of the universal maritime rule of liability *in rem* for cargo and collision damage for which the vessel is responsible, inserted the following provision in the contract:

"Fifth: The company promises to insure the said ships against all risks, and to keep in operation the respective insurance policies for the duration of this contract" [R. 50].

This provision, and the Third Article relating to operating expenses, show that the entire risk of the venture was intended to be thrown upon the corporation. It was in no sense the *alter ego* or mere operating agency for the government. The arrangement amounted in effect to a five-year demise charter. If there were losses arising from

the operation or handling of the BAJA CALIFORNIA, they were to be borne by the corporation—presumably either from accumulated surplus, if any, from capital, from loans, or from insurance policies covering "all (insurable) risks." If the aggregate expenses were less in amount than the gross income, the corporation was to pay to the government an amount equivalent to one-half the net profits.

In pursuance of the terms of the contract the respondent corporation did retain possession of the BAJA CALIFORNIA and direct her commercial operation. It was stipulated that the master of the BAJA CALIFORNIA if called as a witness would have testified:

"All moneys received by me from the operation of the BAJA CALIFORNIA were accounted for to Mr. Abaunza, as manager of the Cia Mexicana de Navegacion del Pacifico, and all expenses (as defined in Paragraph 'Third' of Exhibit 'A') incurred in operating the said BAJA CALIFORNIA, *including the salaries and wages of its officers and crew, who were employed by the Cia Mexicana de Navegacion del Pacifico*, and the cost of supplies necessary for the operation of said ship, were paid for with money delivered by the said Cia Mexicana de Navegacion del Pacifico" [R. 30].

Were there any doubt as to the fact that the corporation, rather than the government, was in possession of the vessel at the time of its seizure, the master's statement just recounted, which was admitted to be true for all purposes by the Republic of Mexico [R. 111], would be determinative. As will be seen in the discussion of *The Navemar* and other cases, *infra*, when a private corporation receives the ship's gross income, disburses all its ex-

penses, including the salaries of the officers and the wages of the crew, mans, equips and supplies the ship, and completely manages the commercial operation of the vessel, there is no escape from the finding that the corporation has the *actual physical possession* of that vessel. And when that is the case, it is futile for the government to claim that it, too, has the *actual physical possession* of the vessel, particularly, as in this instance, when the corporation manned the ship with its own employees. But unless the government has that realistic-sort of possession it is not entitled to resist the jurisdiction of our courts on a plea of sovereign immunity. The officers and crew were not agents of the Republic, and did not hold the vessel on behalf of the government.

"Constructive possession" or "right to possession" at some future time will avail the foreign sovereign nothing as a basis for a plea of sovereign immunity under the decisions of this Court. See *The Navemar*, 303 U. S. 68; *The Davis*, 77 U. S. (10 Wall.) 15.

Thus all the evidence in the record establishes the fact that a private corporation and not the Mexican Government was in possession of the BAJA CALIFORNIA at all times mentioned in the libel and at the time of the seizure of the vessel by the United States Marshal. There is no contrary evidence. No contention is made in petitioner's opening brief that the Mexican Government had possession. They talk vaguely about "dominion" and "control." The ~~fact~~ is that the Republic had no more dominion or control over the BAJA CALIFORNIA than it had over any other vessel in the Mexican merchant marine. Only in the event of a default did the Republic have the right to retake possession of the vessel. No such default had taken place here.

IV.

The BAJA CALIFORNIA Was Not in the Public Service of the Republic of Mexico at the Time of the Collision or at the Time of Her Seizure Under the Process of the District Court. She Was Being Operated by a Private Corporation as an Ordinary Commercial Vessel.

As will be seen from the authorities referred to in the next section, one of the requirements for a successful claim of sovereign immunity is that the vessel be employed in public service. Petitioners assert that the BAJA CALIFORNIA was in "the public service of Mexico". This contention seems to be based on three theories:

1. That the operating agreement specified that the "public service" is the object of the contract.
2. That the case is within the rule of *Berrizi Bros. Co. v. The Pesaro* (1926), 271 U. S. 562.
3. That the BAJA CALIFORNIA had certain special "governmental" privileges and is subjected to certain "governmental" obligations which, when taken together, brought its operation within the concept of "public service".

None of these theories has any merit. We discuss them in order.

The only sense in which the term "public service" is used in the contract between the corporation and the Republic is that the BAJA CALIFORNIA was being operated as a common carrier serving the public generally. But such public service is not sufficient to confer immunity. If it were, no vessel employed as a common carrier would be subject to the process of any court. "Public service"

for the purpose of sovereign immunity, means service for the direct benefit of the government or the nation as a whole.

It is true that *Berizzi Bros. Co. v. The Pesaro* held that the vessel in that case was engaged in public service as that term is used in the law of sovereign immunity. But the BAJA CALIFORNIA cannot bring herself within the principles of that decision.

In that case there was a libel *in rem* for damages arising from the nondelivery of cargo. The Italian Ambassador appeared specially with a plea of sovereign immunity in which he alleged:

"That the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest."

At the hearing it was stipulated that

"the vessel, when arrested, was owned, possessed and controlled by the Italian Government . . . was employed in the carriage of merchandise for hire . . . and was so employed in the service and interest of the whole Italian nation, as distinguished from any individual member thereof, private or official."

And finally, in phrasing the issue presented to it by an appeal from the dismissal, this Court said:

"The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal District Court exercising admiralty jurisdiction."

Thus, there can be no doubt as to what the contentions were, what the facts were, and what the precise scope of the decision was. In affirming the District Court's dismissal of the libel, this Court relied on and extended the rule of *The Exchange*, 7 Cranch. 116, where sovereign immunity was successfully claimed for a vessel "*possessed by the French government as a warship.*" The Court believed that the principle of *The Exchange* was applicable, because when a government "*acquires, mans, and operates ships in the carrying trade they are public ships in the same sense that warships are.*"

The rule of *Berizzi Bros. Co. v. The Pesaro* does not apply to the BAJA CALIFORNIA, because *The Pesaro* was "*possessed*", "*controlled*", "*operated*", and "*manned*" by the Italian Government, and "*was so employed in the service and interest of the whole Italian nation, as distinguished from any individual member thereof, private or official.*"

The BAJA CALIFORNIA, on the other hand, was "*possessed*", "*controlled*", "*operated*," and "*manned*" by a private corporation, and was not employed by it in the interest of the whole Mexican nation, as distinguished from any individual member thereof.

If it be suggested that government ownership alone is sufficient to bring a foreign vessel within the rule of *Berizzi Bros. Co. v. The Pesaro*, or that the rule of the case should be so extended, the answer to the first part of the suggestion is that such a construction of the opin-

ion would torture the decision beyond recognition, and the answer to the second part of the suggestion is that such an extension of the rule is foreclosed by the authorities, to be discussed in the next section of this Brief.

The third and last "public service" theory advanced by petitioners seems to be (Petitioners' Brief, p. 19) that certain "governmental" privileges accorded the BAJA CALIFORNIA by the contract and certain "governmental" obligations imposed upon the vessel by the contract, place the vessel in the public service of the Government of Mexico. This argument is destroyed by a reference to the general Mexican Law applicable to common carriers, from which it will be seen that these alleged "governmental obligations and privileges" specified in the contract are not peculiar to the BAJA CALIFORNIA but are applicable to any Mexican merchant vessel.

A comparison of the contract under which the BAJA CALIFORNIA was being operated and the translation of the Mexican law of "the general lines of communication" [R. 83-110] shows that the corporation, in its operation of the BAJA CALIFORNIA, is treated in all substantial respects the same as are all other private corporations engaged in the merchant shipping business. Thus the contract provision for one-half the net profits [R. 50] is merely a compliance with Article 110 of the General Law [R. 100] providing for governmental "participation" in the revenue of all private shipping companies. The provisions of Article 8 of the contract that the routes shall be approved by the Government [R. 51] simply follow

Article 200 of the General Law applicable to all the Mexican merchant marine [R. 104]. The requirement that naval, army or political officers should be transported free or at reduced rates [R. 52] is an exact paraphrase of the General Law applicable to all merchant ships. See Articles 57, 58, 102, 104 and 118 [R. 95, 96, 99, 100]. The provisions giving port facilities [R. 54, 55] are not basically different from Articles 27 and 183 of the General Law [R. 92, 102]. The "sovereign control" of the Mexican Government over the services provided in the contract is a mere restatement of the General Law applicable to the termination of all concessions and contracts and the revocation of permits [R. 92]. The alleged power to replace the management relates only to a situation when the corporation might be in default. And even then, in most cases, there must be a hearing before the contract can be terminated [R. 60]. Unless the corporation breached the agreement, the Republic had no authority to dispossess the corporation for five years [R. 60].

The master's summary of the ship's operations for a period of two months from the time of the collision to the time of the seizure under process herein, which has been admitted as true for all purposes by the Republic of Mexico [R. 111], is not the story of a ship in governmental service. It is the story of a typical tramp merchant ship engaged in coastal and foreign trade, carrying, with a few inconsequential exceptions, private cargo at the regular rates and private passengers at full fare [R. 28-30]. The corporation was simply engaged in the

transportation of passengers and cargo for hire and the BAJA CALIFORNIA was no more "in the public service" of the Republic of Mexico than is any other vessel in that nation's merchant fleet.

These operations were peacetime operations. The Republic of Mexico was not at war until May 29, 1942.

We now turn to a consideration of the authorities on sovereign immunity. We are concerned with a ship which is privately operated and which is subject to the same obligations and entitled to the same privileges as are other Mexican ships. We might add that all ships, including those of our own merchant marine (at least in times of peace) are subject to substantially the same governmental obligations (reduced rates, etc.) and are entitled to similar privileges (subsidies, etc.). Obviously all Mexican ships, as well as American ships and ships of other countries, performing "public services" *in this broad sense* of the word cannot be accorded sovereign immunity. Such a course would create international havoc rather than comity. The factual basis for the plea of sovereign immunity by the Republic of Mexico is thus narrowed down to *title* alone. This, under well settled law, and the decisions of this Court, is not a sufficient reason for requiring a court to withhold its normal jurisdiction.

V.

Since the Baja California Was Neither in the Possession nor the Public Service of the Republic of Mexico, the Claim of Sovereign Immunity Was Properly Denied, Regardless of the Fact That the Mexican Government Had Title to the Vessel. The Authorities Cited by Petitioners Do Not Sustain the Contention That Title Alone Is Sufficient to Establish Immunity for a Foreign Government Owned Merchant Vessel From the Process of Our Courts. The Modern Trend Is to Restrict, Not Enlarge, the Immunity of State Owned Commercial Vessels.

In *The Navemar* (1938) 303 U. S. 68, this Court held that a vessel owned by, but *not in the possession or public service* of a foreign government was not entitled to immunity. The NAVEMAR was libeled by a private company under a claim of ownership. It was asserted that the crew unlawfully deprived libelant of the possession of the vessel. The Spanish (Loyalist) Government claimed that the vessel was immune from process, in that title had been taken by the Government as the result of a decree of expropriation published in Spain while the NAVEMAR was at Buenos Aires. The District Court held that the Spanish Government could not bring itself within the rule of *Berizzi Bros. Co. v. The Pesaro*, *supra*, unless it could "show not merely that the vessel was the *property* of the Republic of Spain but also that it was *possessed* by that government and was *operated by it in its service and interest*. Otherwise immunity cannot be successfully urged to protect a ship, engaging in the carriage of merchandise for hire, from seizure by judicial process." (17 F. Supp. at 650.) At a second hearing before the Dis-

trict Court it was held that "constructive possession" flowing from ownership is not the equivalent of physical possession necessary to confer immunity (18 F. Supp. 157). The District Court was reversed by the Circuit Court of Appeals on the grounds that the allegations of possession and public service contained in the Ambassador's "Suggestion" were conclusive on the Court, and that in any event the Spanish Government had "constructive possession" which was sufficient as a basis for sovereign immunity.

This Court reversed the Circuit Court on both grounds and upheld the District Court. In a unanimous decision it held that the allegations in the Ambassador's Suggestion were not conclusive on the Court. It held that immunity was properly denied because the Spanish Government did not prove its claim that the NAVEMAR had been in the possession of the Spanish Government. Nor did it support its contention that the vessel was in fact employed in public service. That case, then, is authority for the proposition that a vessel owned by, but not in the actual possession and the public service of, a foreign government is not entitled to immunity.

The Navemar case, we submit, disposes of the only issue presented here. The distinction suggested by petitioners (Opening Brief p. 23) is untenable. In that case, and in our case, the plea of sovereign immunity was disallowed because the vessel was not in the possession of the sovereign nor in the public service and the fact of ownership by the sovereign was immaterial. If there be any distinction it would seem that a vessel expropriated by a government in time of war would more readily be given immunity than a ship which in peace time was turned

over to a private corporation for operation in a business venture.

The suggestion in *The Navemar* that a claim of immunity might be supported by some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government, is not applicable here. The Mexican Government took no steps, formal or otherwise, to repossess the vessel at any time before process was served. The officers and crew of the BAJA CALIFORNIA were in the employ and pay of the private corporation and were in no sense agents of, nor were they controlling the vessel in behalf of the Mexican Government.

The requirement of public service referred to in *The Navemar* as a prerequisite for immunity is well settled. *In re State of New York* (1920) 256 U. S. 503, stressed the fact that the exempt vessel was "employed in the public service of the state for governmental uses and purposes."

In *The Fidelity* (C. C., N. Y., 1879), Fed. Case No. 4758 the court said (8 Fed. Case, p. 1191):

"Property does not necessarily become a part of the sovereignty because it is *owned* by the sovereign. To make it so it must be *devoted to the public use*, and must be employed in carrying on the operations of the government."

The necessity of *actual possession* emphasized in *The Navemar* is not a new doctrine. It was first clearly stated by this Court in *The Davis* (1870), 77 U. S. (10 Wall.) 15, where it was held that a salvage lien was enforceable against property belonging to, but not in the actual possession of the United States. See also *United States v.*

Wilder (1838), Fed. Cas. 16694, in which Judge Story held that a general average lien might be asserted on property belonging to the United States. The rule requiring actual possession as a basis for immunity was applied by Judge Addison Brown in *Long v. The Tampico* (S. D., N. Y. 1883) 16 Fed. 491, in allowing a salvage claim brought against a vessel intended for the Mexican Government as a revenue cutter, where the ship was not yet in the possession or public service of the government.

In *The Florence H* (S. D., N. Y. 1918) 248 Fed. 1012, Judge Learned Hand stated that the rule denying immunity without actual possession was not limited to salvage cases.

In *The Attualita* (C. C. A. 4th, 1916) 238 Fed. 909, a vessel requisitioned and in the service of the Italian Government was not accorded immunity where she was operated by private owners who paid the crew and all other expenses of the ship.

To the same effect is:

Maru Navigation Co. v. Societa Commerciale Italiana di Navigazione (D. Md. 1921) 271 Fed. 97.

In *The Beaverton* (S. D., N. Y. 1919) 273 Fed. 539, the court denied immunity to a vessel under charter to the French Republic, but not in its possession, following the rule that the test of immunity was the possession of the foreign sovereign, not its ownership.

The Johnson Lighterage Co. No. 24 (D. N. J. 1916) 231 Fed. 363, held that a suit *in rem* might be maintained against the property of a foreign (Russian) government

for salvage services where the property at the time of seizure by the marshal was not in the actual possession of an officer of that government.

In *The Katingo Hadjipatera*, 1941 A. M. C. 581, 40 F. Supp. 546, affd. 119 F. (2d) 1022, cert. den. 313 U. S. 593, it was held that the Greek Government was not entitled to claim immunity for a vessel it had requisitioned where physical possession of the vessel had not been taken prior to the filing of the libel.

The Uxmal (D. Mass. 1941) 40 F. Supp. 258, denied immunity to the vessel owned by the Mexican Government where she had been delivered to a cooperative association of producers of sisal, even though the Mexican Government contributed to the capital of the association and had reserved the right to repossess the vessel in the case of national emergency. The Court held that ownership was not sufficient to confer immunity, the vessel not being in the possession nor the public service of the Republic of Mexico.

United States of Mexico v. Rask (1931), 118 Cal. App. 21, 4 Pac. (2d) 981 (Sup. Ct. hrg. denied 1931) rejected a claim of immunity by the Republic of Mexico as a defense to a repair lien asserted against a patrol boat owned by the Mexican Government. The immunity was refused because the government did not have possession of the boat.

Most of the cases where immunity was granted proceeded expressly on the theory that the foreign government had actual possession. This is true of *Berizzi Bros. Co. v. The Pesaro*, *supra*. It is also true of *The Carlo Poma* (C. C. A. 2d 1919) 259 Fed. 369, 370.

In *The Maipo* (S. D., N. Y. 1918) 252 Fed. 627, 629, the Court pointed out that the Chilean Government doubtless was at pains to keep a vessel in its possession for the very purpose of preserving her sovereign immunity.

In *Ervin v. Quintinalla* (C. C. A. 5th, 1938) 99 F. (2d) 935, the Court, in granting immunity, recognized that the claim of immunity was based upon actual possession in the Mexican Republic. The officers and crew expressly agreed to hold the ship for the government and were employed and paid by the government.

In *The Janko* (E. D., N. Y. 1944) 54 F. Supp. 241, 243, the Court held that possession of a vessel of a friendly foreign government is sufficient to give immunity and the question of ownership is immaterial.

Thus it will be seen, as Judge Woolsey remarked in *Bradford v. Chase National Bank of the City of New York* (S. D., N. Y. 1938) 24 F. Supp. 28, 36:

"The touchstone of a successful claim of immunity for any property is that the property is in the possession of the sovereign. . . ."

The intimation in the District Court case of *The Roseric* (D. C., N. J., 1918), 254 Fed. 154, that the appropriation by a government of a vessel and its devotion to public service might be sufficient to confer immunity even without exclusive possession, cannot now be taken to be a correct expression of law, if it ever was.* In any

*See Lawrence Preuss, *State Immunity and the Requisition of Ships During the Spanish Civil War*, 36 Am. Jour. Int. Law 37, 50, where the author points out that earlier decisions intimating that requisition alone operates to confer immunity without actual possession must be considered as overruled by *The Navemar*. See also note in 6 George Washington Law Review, 542.

event the case is inapplicable to our situation because the ROSERIC was being operated under the immediate direction and control of the British Government in connection with the prosecution of the war.


THE AUTHORITIES CITED BY PETITIONERS DO NOT
SUPPORT THEIR CLAIM OF IMMUNITY.

It is of course axiomatic in our law that the state cannot be directly sued without its consent and that the same immunity has been accorded foreign governments by analogy. But the basis for the immunity of the domestic sovereign is not the same as the basis of the immunity of the foreign sovereign. The domestic sovereign is exempt from process without his consent on the ground that there can be no legal right as against the authority that makes the law upon which the right depends. The immunity of the foreign sovereign, however, does not stem from any lack of power. It flows from considerations of comity and practical expediency in friendly international intercourse.*

Property in the possession and public service of the sovereign is likewise exempted. But considerations of comity and expediency do not require the extension of the immunity to property which can be directly proceeded against without dispossessing the sovereign.

*See John G. Hervey, Immunity of Foreign States When Engaged in Commercial Enterprises—a Proposed Solution. 27 Michigan Law Review, 751, 760;

Ernest Angell, Sovereign Immunity, The Modern Trend. 35 Yale Law Journal 150, 152.



The cases cited by petitioners do not sustain their position. *Kawanañakoa v. Polyblank*, 205 U. S. 349; *Keokuk & Hamilton Bridge Co. v. U. S.*, 260 U. S. 125, *United States v. Clarke*, 33 U. S. (8 Pet.) 436, 444, simply state the general rule that the domestic sovereign is exempt from suit without its consent. *Belknap v. Schild*, 161 U. S. 10, holds that an injunction cannot be maintained to prevent the use of property actually in the possession of the United States. *In Re State of New York*, 256 U. S. 503, and *Briggs v. Light Boats*, 11 Allen (93 Mass.) 157, *The Siren*, 7 Wall. (74 U. S. 152, stand for the principle that property in the actual possession and control of the domestic government or one of the states, and employed in governmental service, is immune from seizure.

This is not a suit against the Republic of Mexico. It is a suit to enforce a lien on property which was not in the government's possession nor devoted to its public service. It is an action against the thing itself. It is settled in admiralty that the ship is liable for the tortious acts of anyone who lawfully comes into possession of her and directs her navigation, be he charterer, agent or crew. *The Barnstable* (1901), 181 U. S. 464, 467; *The China* (1868), 7 Wall. (74 U. S.) 53.

The cases cited by petitioners, such as *United States v. Rodgers*, 150 U. S. 249, applying in certain instances the fiction that a vessel is regarded as a part of the territory to which it belongs at home, do not have any bearing on the present case. It was aptly said by this Court in *Cunard Steamship Co. v. Mellon*, 262 U. S. 100, 123, that this "is a figure of speech, a metaphor." On page 124: "The merchant ship of one country, voluntarily entering

the territorial limits of another, subjects herself to the jurisdiction of the latter." In Fenwick on International Law, Second Revised Edition, page 218, it is said: "This fiction of the 'extritoriality' of vessels, while it finds expression in numerous decisions of British and American courts, has been rejected by most modern writers. . . ." And again at page 222: "Merchant vessels in foreign ports are not exempt from civil suit *in rem* brought by a citizen of the foreign state. . . ." See also *Sharrenberg v. Dollar S. S. Co.*, 245 U. S. 122, 127.

The cases of *Octjen v. Central Leather Co.*, 246 U. S. 297, and *U. S. v. Belmont*, 85 F. (2d) 543, are not in point. Those cases merely stand for the rule that acts of a foreign state done in its own territory and valid by its own laws, will be given recognition in our courts.

United States v. Allegheny Co. Pennsylvania (1944), 322 U. S. 174, is equally wide of the mark. That case deals with the constitutional relation between state and federal governments with regard to the taxation of governmental property. It does not remotely touch our question.

The Exchange (1812), 7 Cranch. (11 U. S.) 116, needs no other distinction than the fact that it concerned a warship in the actual possession of the French Government.

The Western Maid (1922), 257 U. S. 419, is likewise inapplicable. In that case this Court held that three vessels owned by or demised to the United States were immune from process. The WESTERN MAID was a transport carrying foodstuffs for civilian relief in Europe to be administered under the Food Administration Grain Corporation. It was manned by a Navy crew. The LIBERTY was a pilot boat, also manned by a Navy crew, and the CARO-

LINIAN was an Army transport in charge of an Army crew. Thus all three vessels were in the possession and public service of the sovereign. It is true that Mr. Justice Holmes does not stress the fact of possession in his opinion, but it is clear that he does not regard title as the significant criterion. His opinion turns on the public character of the services being performed, and the inference to be drawn from it is that the immunity might have been denied if the vessels could have been regarded as merchant vessels at the time the claims arose.

Dexter & Carpenter v. K niglig J rnv gss tyrelsen, 43 F. (2d) 705, stands for the principle that a sovereign invoking the jurisdiction of a court waives immunity as respects that particular litigation, but does not subject its property generally to seizure on execution. The case does not touch our problem, which has to do with the enforcement of a specific lien on a vessel neither in the possession nor public service of the sovereign.

The quotation from Benedict on Admiralty on the last page of petitioners' Opening Brief shows on its face that the refusal of jurisdiction *in rem* is limited to cases where the seizure results in a *dispossession* of the sovereign.

The English cases on sovereign immunity, as petitioners themselves suggest, are not really analogous to our own. The English procedure *in rem* is not like ours, basically an action against the *res* itself, but rather in substance an action against the owner coupled with the right of arrest.* As there is difficulty in any proceeding resembling a direct action against a foreign sovereign, the English cases have

*See Robinson on Admiralty, p. 363. This difference in procedure is mentioned in *Berizzi Bros. Co. v. The Pesaro*, *supra*.

tended to be more sweeping in granting immunity than our own. *The Parlement Belge*, L. R. 5, P. D. 197, until recently has been regarded as the leading English case. The principle actually decided in that case was that a vessel in the possession of a foreign state, used primarily as a mail packet, was immune from process, although she was used subordinately for trading purposes. But the case also was based in part on the theory that a proceeding *in rem* under the English practice in effect impleads the owner and that therefore a proceeding against a vessel owned by a foreign state was objectionable because it indirectly impleaded that foreign state. It was on this latter principle that *The Porto Alexandre* [1929] P. 30, was decided. There the Court of Appeal agreed that the employment of a state-owned vessel for trading purposes did not deprive her of immunity. But these cases are probably no longer law in England.

In *The Annette; The Dora* [1919] P. 105, immunity was denied to two vessels which the Provisional Government of Northern Russia claimed to have requisitioned. The decision was based on two alternative grounds, first, that the government was not officially recognized by the British Foreign Office, and second, that if it were a sovereign government it had parted with the *possession*. The Court said (page 111):

"But even if I were satisfied that the Provisional Government of Northern Russia was a sovereign state, I should then have to consider whether the government is in possession of this vessel. If it is not, in possession, the Court interferes with no sovereign right of the government by arresting the vessel nor does it, by arresting the vessel, compel the government to submit to the jurisdiction or to abandon its possession."

The evidence showed that the vessel, after having been taken over by the Provisional Government of Northern Russia, was let out to hire to a partnership called "The Polar Star" for trading purposes. The Court (Mr. Justice Hill) said (page 112):

"It seems to me that upon the vessel being handed over to that association, if she ever was in the possession of the Provisional Government she passed out of that possession and was put into the possession of this partnership, not as agents of the Provisional Government but under a contract by which, in effect, the vessel was demised to the partnership; and that from that time forward nobody was in possession of the vessel except the partners, or if the partners embrace more than the master and crew—it is not very clear how that is—she was in the possession of the master and crew for the partnership. The fact that by the contract it was provided that the trading should be under the control and instructions of an official of the Provisional Government does not seem to me to affect the possession of the vessel."

The first case on the sovereign immunity of a foreign vessel to go before the House of Lords was *The Cristina* [1938] A. C. 485. All that the House of Lords really decided in that case was that a vessel in the actual possession of a recognized foreign government which had obtained such possession for public (*i. e.*, non-commercial) purposes was immune, but the opinions of at least three of the Lords indicate that the immunity of purely commercial vessels is at least doubtful and that *The Porto Alexandre, supra*, is no longer the law in England. Fur-

thermore, the emphasis throughout the opinions of the Lords on possession strongly indicates that the English view as expressed in *The Annette*, *The Dora*, *supra*, is now identical with the American, that actual possession rather than ownership is the test for sovereign immunity. See, for example, the statement of Lord Macmillan (page 498):

"I confess that I should hesitate to lay down that it is part of the law of England that an ordinary trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign state."

Lawrence Preuss, in an article "State Immunity and the Requisition of Ships During the Spanish Civil War," 35 *Am. Jour. Int. Law* 263, 269, says:

"The *dicta* on this question are of the greatest general interest, since they foreshadow a possible future shift from the doctrine of absolute immunity held up to this time by the British courts. . . ."

In *The Arantzazu Mendi* [1939] A. C. 256, a decision quite similar to *The Cristina*, the House of Lords again treated possession as the decisive, if not the indispensable factor to support a claim of sovereign immunity.

*For other comment on *The Cristina*, see: 39 *Columbia Law Rev.* 510; 2 *Modern Law Review* 57; 16 *New York University Law Quarterly Review*, 490; and 54 *Law Quarterly Review*, 339. This Court pointed out in *The Navemar* that the *Cristina's* officers and crew were in the pay of the government.

THE MODERN TENDENCY IS TO RESTRICT, NOT ENLARGE,
THE IMMUNITY OF STATE-OWNED COMMERCIAL
VESSELS.

It is not true, as petitioners suggest, that "changing governmental structures" (Brief p. 24) require any enlargement of the immunity principle. The modern doctrine shows exactly the opposite tendency. The Brussels Convention of 1926 for the unification of certain rules relating to the immunity of state-owned vessels, provides that government owned or government operated commercial vessels, even those in the actual possession of the government, may be arrested the same as privately owned commercial ships. This convention was ratified by Mexico September 15, 1932 (see 6 Benedict on Admiralty, p. 55). While we do not contend it is binding here, since it has not yet been ratified by our own government, it shows that the Mexican Republic has agreed to the principle of non-immunity going far beyond the holding in our case. In the face of this convention, it is impossible for petitioners to contend that the acceptance of jurisdiction by the courts in this case was contrary to any recognized rule of international law.

Our own government has, of course, waived immunity from suit both with respect to its ships employed as merchant vessels (Suits in Admiralty Act, 46 U. S. C. A. §741) and with respect to the operation of "public," *i. e.* non-commercial, vessels (Public Vessels Act, 46 U. S. C. A. §781). There is almost universal agreement among the authorities on international law that a government operating commercial vessels should not in principle be entitled to claim immunity with respect thereto. Some of the reasons for this virtual unanimity of opinion are:

The large development of state-owned commercial ships has made the problem increasingly acute in recent years. The principle of immunity gives the government vessel an unfair competitive advantage over privately owned ships amounting to a subsidy at the expense of citizens of another country.

The theoretical basis for granting immunity is unsound. It is unrealistic to suppose that international complications will arise from enforcing liabilities against these merchant vessels by orderly court procedure. There is more chance for friction if the claims of private litigants are left to diplomatic action.

The makeshift diplomatic remedy is expensive, dilatory and inefficient. It leads to attempts to apply political influence, and just claims are rejected on the *ex parte* statements of nationals of the state owning the vessel. Only the courts have the necessary machinery for sifting evidence and disposing of such claims on their merits.

It is unjust to the citizens of the state of the forum to deprive them of a speedy and adequate remedy for the redress of proper claims against merchant vessels owned by another government.

Some of the authorities expressing these considerations are:

Westlake, Private International Law (7th Ed.), p. 269:

"There is a growing feeling of jurists, both in England and the Continent, that the complete immunity granted to public vessels engaged in trade or to vessels requisitioned by the state, is contrary to sound principles."

Hall, International Law (8th Ed., 1924), p. 249, Note:

"On general principles of justice it would appear that when a state engages in international trade its vessels so employed should be subject to the same treatment as private vessels in foreign ports, and there is a growing consensus of opinion in this direction which manifested itself at the London Conference of the International Maritime Committee in October, 1922."

Cheshire, Private International Law (2d Ed.), p. 96:

"Recently, however, it has been widely recognized that ships engaged in commerce ought not to be immune from jurisdiction and by the Immunity of States' Ships Convention, concluded at Brussels in 1926, as amended by a protocol on May 24, 1934, it was agreed that commercial vessels and cargoes belonging to States should be justiciable to the same extent as if privately owned. . . ."

Jasper Y. Brinton, in an article entitled "*Suits Against Foreign States*," 25 *Am. Jour. Int. Law*, 50, 61, quotes the late President Loder of The Hague Court as follows:

"Whenever a state becomes the owner of a ship or charterer or carrier for its own merchandise or for those of the public, it assumes the role of a private individual and should be treated as such; renunciation of immunity is to be presumed whenever it is a question of private rights."

And see 1 *Oppenheim, International Law* (5th Ed.), 668, 670; *Fenwick, International Law* (2d Ed.), 228; 1 *Wheaton, International Law* (6th English Edition), 240; *Hyde, International Law*, Section 257; *Alfred Hayes, Private Claims against Sovereigns*, 38 *Harvard Law Re-*

view, 599; and Lord Maugham's remarks in *The Cristina* [1938] A. C. 521.

We are not sure that we understand the basis of petitioners' assertion (Opening Brief p. 25) with respect to the status of lend-lease property. Petitioners' alarm in this connection seems to be without foundation. The decision in this case could not affect such property, at least if in the possession of agents or any government and employed for public purposes. None of it, so far as we are aware, is in the possession of private individuals for purely commercial purposes.

Nor do we believe there is any basis for petitioners' apprehension with respect to possible discrimination in favor of vessels owned and operated by the Soviet Union. It may well be that during the war Russian ships are owned and operated by the state, but we do not understand that this has been the Russian practice in times of peace. Lord Maugham said in *The Cristina* [1938] A. C. 485, 523:

"The Soviet Republic has apparently adopted the admirable practice of owning its merchant ships through limited companies, and does not claim—even if it could, which for my part I should doubt—any immunity whatever in relation to such ships."

But even if there should be some discrimination, as petitioners suggest, in connection with widespread state operation of commercial vessels, the cure, we submit, would be a statute limiting or repealing the doctrine of *Berizzi Bros. Co. v. The Pesaro*, and not to extend *The Pesaro* decision beyond its present scope. To make that decision applicable to our case would mean overruling *The Nave-mar*. In other words, make all commercially operated

vessels subject to seizure, instead of granting immunity to them all, and do it, if that is what is wanted, by Congressional enactment or treaty.*

This would be doing nothing more than putting into effect the oft-repeated words of Mr. Justice Marshall in *The Bank of the United States v. The Planters Bank of Georgia* (1824), 22 U. S. (9 Wheat.) 904:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and take the character which belongs to its associates, and to the business which is to be transacted. * * *"

*Nearly all the commentators and text writers believe that the doctrine of *The Pesaro* case should be limited or repealed. See, for example, Robinson on Admiralty, p. 277; 50 Yale Law Journal, 1088; 40 Harvard Law Review, 126; and 16 Boston University Law Review, 115.

The following articles recommend changing *The Pesaro* rule by statute: John G. Hervey, The Immunity of Foreign States When Engaged in Commercial Enterprises—a Proposed Solution, 27 Michigan Law Review, 751; Frederick Rockwell Sanborn, The Immunity of Merchant Vessels When Owned by Foreign Governments, 1 St. John's Law Review, 5. Notes in 36 Yale Law Journal, 145, and 3 George Washington Law Review, 65 suggest a treaty. Jesse Andrews Raymond, Sovereign Immunity in Admiralty, 9 Texas Law Review, 519, recommends a statute denying immunity to state owned commercial vessels but believes the matter could be reached by judicial decision.

It was said by this Court in *Cooke v. United States* (1875), 91 U. S. 389, 398:

"Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there."

To sustain the decisions of the District Court and Circuit Court of Appeals in this case it is not necessary to disturb the doctrine of *Berizzi Bros. Co. v. The Pesaro*. But to reverse the decisions of the lower courts here would require a departure from the doctrine of *The Nazemar*. On principle, there is no reason for reversing the decision of the Circuit Court of Appeals and every reason for affirming it.

Conclusion.

The District Court and the Circuit Court of Appeals followed well-settled rules in denying the claim of sovereign immunity in this case. The Republic of Mexico, as petitioners are at such pains to assert, is a friendly foreign power. But there should be nothing prejudicial to amicable international relations in enforcing the law applicable to a claim against a commercial vessel which the Republic voluntarily put into the possession and operation of a private corporation. No complaint is or could be made as to the fairness of the trial or the correctness of the decision on the merits of the claim. The Republic was given every opportunity to present its defenses and contest the case throughout. It saw fit not to appeal

except on the immunity issue. The sole fault of the BAJA CALIFORNIA for the collision and the resulting total loss of the LOTTIE CARSON stands conceded. Is it not a permissible inference that the Mexican Government itself was satisfied that the case on liability was correctly decided? And the sovereign immunity point was correctly decided too. The decision of the lower courts should be affirmed.

Respectfully submitted,

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HAROLD A. BLACK,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 455.—OCTOBER TERM, 1944.

The Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico, as Owner, Petitioners, <i>vs.</i> R. B. Hoffman.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit
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[February 5, 1945.]

Mr. Chief Justice STONE delivered the opinion of the Court.

The question is whether, in the absence of the adoption of any guiding policy by the Executive branch of the government the federal courts should recognize the immunity from a suit in rem in admiralty of a merchant vessel solely because it is owned though not possessed by a friendly foreign government.

Respondent, owner and master of the Lottie Carson, an American fishing vessel, filed a libel in rem in the district court for southern California against the Baja California, her engines, machinery, tackle and furniture, for damage alleged to have been caused when the Baja California negligently caused her tow to collide with the Lottie Carson in Mexican waters. The Mexican Ambassador to the United States, acting in behalf of his government, thereupon filed in the district court a suggestion that the Baja California at all the times mentioned in the libel and at the time of her seizure was owned by the Republic of Mexico and in its possession, and engaged in the transportation of cargoes between the ports of the Republic of Mexico and elsewhere. Libellant put in issue the allegations of the suggestion that title to the Baja California was at any time in the Mexican government and denied that she was in that government's possession, public service or use. Trial of these issues proceeded upon stipulated evidence.

In the meantime the United States Attorney for the District, acting under direction of the Attorney General, filed in the district court a communication from the Secretary of State to the Attorney General, in which the State Department called attention to the claim of the Mexican government, already detailed.

The Department took no position with respect to the asserted immunity of the vessel from suit other than to cite *Ervin v. Quintanilla*, 99 F. 2d 935, and *Compania Espanola v. The Navemar*, 303 U. S. 68. In *Ervin v. Quintanilla*, *supra*, the asserted immunity from suit of *The San Ricardo*, a vessel of the Mexican government, was allowed by the court on the ground that at the time of her seizure upon a libel in rem she was in the possession and service of that government. And in *Compania Espanola v. The Navemar*, *supra*, the State Department having failed to recognize the claimed immunity of the Spanish vessel *Navemar*, alleged to have been expropriated by and in the possession of the friendly Republic of Spain at the time of her seizure upon a libel in rem, this Court denied the claimed immunity on the ground that the libelled vessel was not shown to have been in the possession and public service of the foreign government.

The district court was unable to find, under the rule of *The Navemar*, *supra*, any ground for relinquishing the jurisdiction over the vessel, and accordingly denied the claim of immunity. The Mexican government then filed an answer to the libel by which it put in issue the material allegations of the libel on the merits and renewed its claim of sovereign immunity from the suit. The court then proceeded with the trial on the merits.

A second suggestion was then filed by the United States Attorney at the direction of the Attorney General, transmitting a communication from the State Department, stating that it accepted as true the contention that the Baja California was the property of the Mexican government and that it recognized a statement by the Mexican Ambassador that his government would meet any liability decreed against the vessel as a binding international undertaking. The district court denied the claim of immunity, finding that the ship was in "the possession, operation, and control" of the *Compania Mexicana de Navigacion del Pacifico, S. de R. L.* This was a privately owned and operated Mexican corporation engaged in the commercial carriage of cargoes for hire for private shippers. On the merits the district court gave judgment for the libellant.

The Circuit Court of Appeals for the Ninth Circuit affirmed, 143 F. 2d 854, holding on the authority of *The Navemar*, *supra*, and *The Katingo Hadjipatera*, 119 F. 2d 1022, that the Baja California, although owned by the Mexican government, was not immune from

suit because not in its possession and service. We granted certiorari, — U. S. —, on a petition which presented the question whether title of the vessel without possession in the Mexican government is sufficient to call for judicial recognition of the asserted immunity.

The decisions of the two courts below that the vessel was not in the possession or service of the Mexican government are supported by evidence and call for no extended review here. It is sufficient that it appears that before the injury to the Lottie Carson the Baja California was delivered by the Mexican government to the privately owned and operated Mexican corporation under a contract for a term of five years. As provided by the contract the corporation was to operate the vessel at its own expense in a private freighting venture on the high seas between Mexican ports and between them and foreign ports, and did so operate the vessel until her seizure upon the libel. The officers and crew were selected, controlled and paid by the corporation. For the use of the vessel the corporation agreed to pay to the Mexican government fifty per cent of the net profits of operations but, undertook to bear all net losses.

The principal contention of petitioner is that our courts should recognize the title of the Mexican government as a ground for immunity from suit even though the vessel was not in the possession and public service of that government. Ever since *The Exchange*, 6 Cranch. 116, this Government has recognized such immunity from suit, of a vessel in the possession and service of a friendly foreign government, *L'Invincible*, 1 Wheat. 238, 252; *The Divina Pastora*, 4 Wheat. 52, 64; *United States v. Cornell Steamboat Co.*, 202 U. S. 184, 190; *Ex parte Muir*, 254 U. S. 522, 531-533; *The Pesaro*, 255 U. S. 216, 219; *Ex parte State of New York*, 256 U. S. 503, 510; *Compania Espanola v. The Navemar*, *supra*, 74; *Ex parte Peru*, 318 U. S. 578, 588, a practice which seems to have been followed without serious difficulties to the courts or embarrassment to the executive branch of the government. And in *The Exchange*, Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when

its certificate to that effect is presented to the court by the Attorney General. *United States v. Lee*, 106 U. S. 196, 209; *Ex parte Muir*, *supra*, 533; *The Pesaro*, *supra*, 217; *Compania Espanola v. The Navemar*, *supra*, 74; *Ex parte Peru*, *supra*, 588. This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings. *Compania Espanola v. The Navemar*, *supra*; *Ex parte Peru*, *supra*.

In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist. That is to say, it is for them to decide whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations. See *Ex parte Peru*, *supra*, 588.

Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. "In such cases the judicial department of this government follows the action of the political branch and will not embarrass the latter by assuming an antagonistic jurisdiction". *United States v. Lee*, *supra*, 209; *Ex parte Peru*, *supra*, 588.

It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.¹ The

¹ This salutary principle was not followed in *Berizzi Bros. Co. v. U. S. S. Pesaro*, 271 U. S. 562, where the court allowed the immunity, for the first time, to a merchant vessel owned by a foreign government and in its possession and service, although the State Department had declined to recognize the immunity. The propriety of thus extending the immunity where the political branch of the government had refused to act was not considered.

Since the vessel here, although owned by the Mexican Government, was not in its possession and service, we have no occasion to consider the questions presented in the *Berizzi* case. It is enough that we find no persuasive ground for allowing the immunity in this case, an important reason being that the State Department has declined to recognize it.

judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. *Ex parte Peru, supra*, 588. But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.

When such a seizure occurs the friendly foreign government may adopt the procedure of asking the State Department to allow it. But the foreign government may also present its claim of immunity by appearance in the suit and by way of defense to the libel. In such a case the court will inquire whether the ground of immunity is one which it is the established policy of the department to recognize. *Ex parte Muir, supra*, 533; *Compania Espanola v. The Navemar, supra*, 74. Such a policy, long and consistently recognized and often certified by the State Department and for that reason acted upon by the courts even when not so certified, is that of allowing the immunity from suit of a vessel in the possession and service of a foreign government.

It has been held below, as in *The Navemar*, to be decisive of the case that the vessel when seized by judicial process was not in the possession and service of the foreign government. Here both courts have found that the Republic of Mexico is the owner of the seized vessel. The State Department has certified that it recognizes such ownership, but it has refrained from certifying that it allows the immunity or recognizes ownership of the vessel without possession by the Mexican government as a ground for immunity. It does not appear that the Department has ever allowed a claim of immunity on that ground, and we are cited to no case in which a federal court has done so. In *The Davis*, 10 Wall. 15, this Court held that a salvage lien was enforceable against property belonging to but not in actual possession of the United States, and in this it followed a decision of Judge Story in *United States v. Wilder*, Fed. Cas. 16694. And in *The Fidelity*, Fed. Cas. No. 4758, (8 Fed. Cas. at 1191) Chief Justice Waite said of the ruling of *The Davis*: "Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public

use and must be employed in carrying on the operations of the government."

In the case of *The Navemar*, *supra*, the Spanish Ambassador asserted on behalf of the Spanish Republic that the seized vessel was the property of the Republic, acquired by expropriation from a Spanish National, but the claim of immunity which had not been recognized by our government was rejected by the Court on the ground that the Spanish government was not in possession of the vessel at the time of her arrest.²

The lower federal courts have consistently refused to allow claims of immunity based on title of the claimant foreign government without possession, both before *The Navemar*, *supra*, *Long v. The Tampico*, 16 Fed. 491, 493, 494 (opinion by Judge Addison Brown); *The Johnson Lighterage Co. No. 24*, 231 Fed. 365; *The Attualita*, 238 Fed. 909; *The Carlo Pima*, 259 Fed. 369, 370, reversed on other grounds 255 U. S. 219; *The Beaverton*, 273 Fed. 539, 540; and since, *Ervin v. Quintanilla*, *supra*, 941; *The Urmal*, 40 F. Supp. 258, 260; *The Katingo Hadjipatera*, 40 F. Supp. 546, 119 F. 2d 1022; *The Ljubica Matkovic*, 49 F. Supp. 936.

Whether this distinction between possession and title may be thought to depend upon the aggravation of the indignity where the interference with the vessel ousts the possession of a foreign state, *Sullivan v. State of Sao Paulo*, 122 F. 2d 355, 360, it is plain that the distinction is supported by the overwhelming weight of authority. More important, and we think controlling in the present circumstances, is the fact that, despite numerous opportunities like the present to recognize immunity from suit of a vessel owned and not possessed by a foreign government, this

² *The Cristina*, 1938, A. C. 485, in which the immunity was recognized, seems to have proceeded on the ground that the possession taken in behalf of the friendly foreign government was actual. Similarly in *The Arantzazu Mendi*, 1939, A. C. 256, 263, the sovereign was "in fact in possession of the ship". In *The Jupiter*, 1924, P. 236, 241, 244 (cf. *The Jupiter No. 2*, 1925, P. 69; *The Jupiter No. 3*, 1927, P. 122, 125), it appeared that before the suit was brought the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. And in *The Porto Alexandre*, 1929, P. 30, 34, the vessel had been requisitioned under the order of the foreign government and on the particular voyage was carrying freight for that government. In *The Annette*; *The Dora*, 1919, P. 165, 111, an alternative ground of decision was that the sovereign had parted with possession. The Court said: "If it is not in possession, the Court interferes with no sovereign right of the government by arresting the vessel, nor does it, by arresting the vessel, compel the government to submit to the jurisdiction or to abandon its possession."

government has failed to do so. We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize. We have considered but do not find it necessary to discuss other contentions of petitioner, as they are without merit.

Affirmed.

Mr. Justice FRANKFURTER, concurring.

In *Berizzi Bros. Co. v. S. S. Pesaro*, 271 U. S. 562, this Court held for the first time that "merchant ships owned and operated by a foreign government have the same immunity that warships have." It did so not because the Department of State by appropriate suggestion or through its established policy had indicated that due regard for our international relations counseled such an abnegation of jurisdiction over government-owned merchantmen. On the contrary. In answer to an inquiry by Judge Mack before whom the *Pesaro's* claim to immunity was first raised, the Department of State took this position: "It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character." *The Pesaro*, 277 Fed. 473, 479-480, note 3; and see 2 Hackworth, Digest of International Law, pp. 429-430, 438-439. Thus, in *Berizzi Bros. Co. v. S. S. Pesaro, supra*, this Court felt free to reject the State Department's views on international policy and to formulate its own judgment on what wise international relations demanded. The Court now seems to indicate however that when, upon the seizure of a vessel of a foreign government, sovereign immunity is claimed, the issue is whether the vessel "was of a character and operated under conditions entitling it to the immunity in conformity with the principles accepted by the department of the government charged with the conduct of our foreign relations."

If this be an implied recession from the decision in *Berizzi Bros. Co. v. Pesaro*, I heartily welcome it. Adjudication should not borrow trouble by worrying about a case not calling for decision. It is for me not borrowing trouble to raise the relation of the *Pesaro* decision to the situation now before the Court. I appreciate that the disposition of the present case turns on the want of possession by the Republic of Mexico. My difficulty is that "possession" is too tenuous a distinction on the basis of which to differentiate between foreign government-owned vessels engaged merely in trade that are immune from suit and those that are not. Possession, actual or constructive, is a legal concept full of pitfalls. Even where only private interests are involved the determination of possession, as in bankruptcy cases, for instance, abundantly prove, engenders much confusion and conflict. Ascertainment of what constitutes possession or what it is, is too subtle and precarious a task for transfer to a field in which international interests and susceptibilities are involved.

If the Republic of Mexico now saw fit to put one junior naval officer on merchantmen which it owns but are operated by a private agency under arrangements giving that Government a financial interest in the venture, it would, I should suppose, be embarrassing to find that Mexico herself did not intend to be in possession of such ships. And, certainly, the terms of the financial arrangement by which the commercial enterprise before the Court is carried on can readily be varied without much change in substance to manifest a relation to the ship by Mexico which could not easily be deemed to disclose a want of possession by Mexico.

The fact of the matter is that the result in *Berizzi Bros. Co. v. S. S. Pesaro*, *supra*, was reached without submission by the Department of State of its relevant policies in the conduct of foreign relations and largely on the basis of considerations which have steadily lost whatever validity they may then have had. Compare the overruling of *The Thomas Jefferson*, 10 Wheat. 428 (1825), by *The Genesee Chief*, 12 How. 443 (1851). The views of our State Department against immunity for commercial ships owned by foreign governments have been strongly supported by international conferences, some held after the decision in the *Pesaro* case. See Lord Maugham in *Compania Naviera Vascongado v. S. S. Cristina* [1938] A. C. 485, 521-523. The real change has been the enormous growth, particularly

recent years, of "ordinary merchandizing" activity by governments. See *The Western Maid*, 257 U. S. 419, 432. Lord Maugham in the *Cristina* thus put the matter:

"Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country?" [1938] A. C. 485, 521-522.

And so, sensible as I am of the weight to which the decision in the *Pesaro* is entitled, its implications in the light of the important developments in the international scene that twenty years have brought call for its reconsideration. The Department of State, in acting upon views such as those expressed by Lord Maugham, should no longer be embarrassed by having the decision in the *Pesaro* remain unquestioned, and the lower courts should be relieved from the duty of drawing distinctions that are too nice to draw.

It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when "the department of the government charged with the conduct of our foreign relations", or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.

Mr. Justice BLACK joins in this opinion.